SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 29 1970
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 913

CHARLES KOEN, PERCY GREEN, RICHARD P. KOCH and JOHN ALLEN,

Petitioners,

—v.—

ISAAC A. LEWIS, WILLIAM H. HARRISON, EDWARD J. WALSH, JR., CLIFTON W. GATES, ALFONSO J. CERVANTES, CURTIS BROSTROM, FRED GRIMES, THOMAS SHANNON, GARY GAERTNER, HONORABLE GEORGE CADY and HONORABLE RICHARD BROWN, JAMES L. SANDERS and VINCENT G. ROGERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CHARLES KOEN, PERCY GREEN, RICHARD P. KOCH and JOEL ALLEN,

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ISAAC A. LONG, WILLIAM H. HARRISON, EDWARD J. WALSH, JR., CLIFTON W. GATES, ALFONSO J. CERVANTES, CURTIS BROSTROM, FRED GRIMES, THOMAS SHANNON, GARY GAERTNER, HONORABLE GEORGE CADY and HONORABLE RICHARD BROWN, JAMES L. SANDERS and VINCENT G. ROGERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners CHARLES KOEN, PERCY GREEN, RICHARD P. KOCH and JOEL ALLEN, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 30, 1970.

Citation to Opinion Below

The opinion of the United States Court of Appeals is reported at 428 F.2d 876 (1970), and printed in the Appendix, *infra*, pp. 35a-36a. The opinion of the United States District Court, Eastern District of Missouri, Eastern Division, is reported at 302 F. Supp. 1383 (1969), and printed in the Appendix, *infra*, pp. 1a-34a.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 30, 1970. On September 18, 1970, Mr. Justice Blackmun extended the time in which to file this petition for certiorari to and including October 28, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

Ordinances Involved

Section 762.030 of the St. Louis Ordinances

Disturbances

762.030 *Public disturbance of the peace.*—No person shall disturb the peace of others by noisy, riotous or disorderly conduct, nor by violent, tumultuous, offensive or obstreperous conduct or carriage, nor by loud or unusual noises, nor by unseemly, profane, obscene, indecent, lewd or offensive language, calculated to provoke a breach of the peace, nor by assaulting, striking or fighting any other person in any park, street, alley, highway, thoroughfare, public place or public resort. (1948, C. 46, a. 20.)

Section 763.010 of the St. Louis Ordinances

Unlawful Assembly

763.010 *Prohibition.*—No person shall join or assemble with another person or persons to act in concert to do any unlawful act with force or violence, against the property of the City or the person or property of any other person, or against the peace or to the terror of other persons, nor make any movement or preparation for such act. (1948, C. 46, e. 80.)

Section 765.010 of the St. Louis Ordinances

Loitering

765.010 *Prohibition.*—No person shall loiter at the corner of streets, or in the vicinity of any place of amusement, or hotel, or public building, or thoroughfare, and refuse to disperse or vacate such place when requested so to do by a police officer (Ord. 47396, Jan. 28, 1955).

Questions Presented

1. Whether petitioners were entitled to a federal judicial declaration that Sections 762.020, 763.010 and 765.010 of the St. Louis Ordinances are unconstitutional, and specifically:

(a) Whether the district court erred in its employment of the doctrines of jurisdiction, abstention and standing so as to bar review of the challenged ordinances; and

(b) Whether the challenged ordinances are so vague and overbroad as to violate the guarantees of free expression of the First Amendment.

2. Whether petitioners were entitled to injunctive and declaratory relief against the unconstitutional procedural regime which prevails in St. Louis's City Court Number One, and specifically:

(a) Whether, in a situation where effective appeals or post-conviction forms of relief are rendered impossible by the very defects in a court's procedural regime which are being challenged, federal relief against local court procedural abuses is appropriate.

(b) Whether the approach to procedural fairness in City Court Number One, described by the district court as "slipshod" and "distasteful" includes elements which constitute violations of the norms of due process and equal protection, and more specifically, whether this is so of the following procedural defects:

(i) The absence of any procedure to insure that defendants are advised of their rights at trial;

(ii) The failure to provide counsel;

(iii) The failure to inform defendants of their right to appeal;

(iv) The requirement that an appeal must be taken "before sunset or the close of court" on the day of conviction, even in the case of defendants who are in custody; and

(v) The requirement that in order to take an appeal a defendant must post the full amount of his

fine or double that amount in a professionally secured bond.

3. Whether the trial court's factual determination that there was no pattern or practice of bad faith law enforcement and prosecution was so clearly erroneous as to require reversal by this Court.

Statement of the Case[1]

Petitioners are members and officers of various civil rights, community action, and student activist groups in the City of St. Louis. They brought this action for injunctive and declaratory relief against various officials associated with the Metropolitan Police Department, the City Counselor and the City Courts of the City of St. Louis. To be enjoined were diverse practices of these officials which were alleged to constitute deprivations of constitutionally protected freedoms, most notably, those of speech, association, due process, and equal protection of the laws. The action was brought on behalf of the petitioners as individuals and as a class action on behalf of other citizens who, like petitioners, belong to organizations which are unpopular with the respondents and who have participated and wish to continue participating by speech and conduct in lawful activities which are controversial and unpopular with respondents. Injunctive relief was sought against respondents' alleged pattern and practice

[1] Because much of the thrust of this petition can be fully considered and evaluated without reference to the complex factual allegations and evidentiary support thereof, this statement of the case is in abbreviated form. Appended to this petition, however, is the much more detailed statement of facts submitted by petitioners to the Court of Appeals below. App. *infra* pp. 40a-62a.

of intimidation and harassment. Petitioners also asked that three St. Louis ordinances, dealing with "Public Disturbance of the Peace", "Unlawful Assembly", and "Loitering", be declared unconstitutional on First and Fourteenth Amendment grounds. In addition, petitioners sought declaratory and injunctive relief against the procedural regime in St. Louis City Court Number One, alleging that aspects thereof—including the failure to inform defendants of their rights at trial, the failure to provide counsel to the indigent, the failure to inform defendants of their right to appeal, and the exceptionally harsh requirements concerning filing notices of appeal and securing appeal bonds—violate the norms of due process and equal protection.

After three days of hearing, in which only the petitioners presented evidence, the trial judge orally denied petitioners' motion for a preliminary injunction and refused to rule on the constitutionality of the challenged ordinances. An appeal from that order was duly perfected to the United States Court of Appeals for the Eighth Circuit. After additional proceedings on March 3, 1969, in which again petitioners presented the only evidence, the District Court Judge entered a judgment and lengthy opinion dismissing the cause. An appeal was duly perfected to the United States Court of Appeals to the Eighth Circuit from that judgment.

The appeals were consolidated by the Court of Appeals, which affirmed the judgments of the District Court a brief *per curiam* opinion.

Reasons for Granting the Writ

The Court of Appeals below affirmed the decision of the District Court with the summary observation that the "lengthy and well-considered opinion" of the trial judge "properly states the applicable law and demonstrates that his factual determinations are based on substantial evidence." App., *infra*, p. 30a. Accordingly, the discussion here is directed to the issues as raised and treated by the District Court, since they have not enjoyed appellate explication.

I.

The District Court declined to render a declaratory judgment on the constitutional validity of St. Louis' public disturbance of the peace and unlawful assembly ordinances on grounds which flatly contradict the rulings of this Court.

Petitioners in the case at bar asked that three municipal ordinances of the City of St. Louis be declared unconstitutional on First Amendment grounds. These ordinances dealt respectively with disturbance of the peace (¸762.030), unlawful assembly (¸763.010) and loitering (¸765.010). In declining to pass upon the first two of these ordinances, the trial court relied upon notions of federal jurisdiction and abstention which flatly contradict the firm pronouncements of this Court, most notably in its unanimous decision in *Zwickler* v. *Koota*, 389 U.S. 241 (1967).[2] The lower

[2] The trial court did not ignore *Zwickler;* in fact it referred prominently to the distinction between injunctive and declaratory relief which is forcefully set out there. See App., *infra* 27a-28a. But the court performed a rather remarkable manipulation. Hav-

court's rulings on each of these two ordinances will be discussed in turn.

Public disturbance of the peace. The District Court found that there was, as regards this ordinance, a "specific live grievance and fear of direct injury." App., *infra*, p. 32a, but declined to rule upon plaintiffs' claim that the ordinance was fatally overbroad in First Amendment terms. In so doing, the District Court found that the ordinance was not "used for the *purpose* of abridging free expression or applied for the *purpose* of discouraging protected activities" App., *infra*, pp. 32a-33a (emphasis added); relying on this finding, the court concluded that the matter was an appropriate one for the application of the abstention doctrine, and drew support for this conclusion from *Douglas* v. *The City of Jeannette*, 319 U.S. 157 (1943).

The notion that bad faith enforcement is a requisite to federal injunctive relief under *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) is not a novel one. In the wake of *Dombrowski*, the question arose as to whether the two factual bases for injunctive relief—the chilling effect of prosecutions under statutes overbroad in First Amendment terms, and the bad faith in which the prosecutions were under-

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ing announced that declaratory relief was to be considered independently of injunctive relief, it then undertook what this Court has described as "the duty to decide the appropriateness and merits of the declaratory request." *Zwickler* v. *Koota*, 389 U.S. at 254, but proceeded to turn the appropriateness inquiry into a discussion of legal principles, the burden of which was that injunctive and declaratory relief were to be treated exactly the same. See App. *infra*, pp. 28a-34a. The result of this Cartesean circle, of course, was to drain the firm pronouncements of *Zwickler* v. *Koota* of any and all content.

taken—were independent, were both required, or whether one or the other was indispensable. While the preponderance of lower federal court decisions have treated the two grounds as independently sufficient, there is some authority for the proposition that bad faith enforcement is a *sine qua non* of *Dombrowski* injunctive relief, and this Court has never expressly addressed itself to the question.

But this issue, interesting as it may be, pertains only to the availability of federal *injunctive* relief. *Zwickler* v. *Koota*, *supra*, makes it perfectly plain that *Dombrowski* is to be read as mandating the availability of federal *declaratory* relief for claims that statutes suffer First Amendment facial invalidity. See 389 U.S. at 254.

Like the lower court in *Zwickler* v. *Koota*, the trial court in the case at bar looked in vain for "special circumstances" justifying the exercise of federal judicial jurisdiction, drawing this standard from *Douglas* v. *City of Jeannette*, *supra*. But as *Zwickler* v. *Koota* teaches, this is in precise opposition to the correct standard, namely, whether there are "special circumstances" to justify abstention, with the ambit of "special circumstances" especially narrowed in claims of First Amendment facial invalidity. 389 U.S. 248-52. The trial court exposed no circumstances which justify abstention as to the review of Section 762.020 of the St. Louis Ordinances.

Unlawful Assembly. As regards this ordinance, the District Court once again found that there was a "specific live grievance" and an "immediate danger of injury" App. *infra*, p. 29a, and once again declined to consider petitioners' prayer for declaratory relief on First Amendment

grounds. The trial court noted that at the time of its decision, four members of petitioners' class were appealing convictions under the ordinance in the Missouri State courts and from this circumstance adduced three discreet bars to the exercise of its jurisdiction (App., *infra*, pp. 30a-32a):

(1) The rigorous standards of *Dombrowski* and *Cameron* v. *Johnson*, 390 U.S. 611 (1968), for intervention in pending criminal prosecutions were not met;

(2) The granting of declaratory relief would conflict with 28 U.S.C. §2254; and

(3) It would conflict with 28 U.S.C. §2283.

From *Dombrowski*, the trial court extracted the concept that "it was peculiarly inconsistent with the principles of federalism for the federal judiciary to interfere with the orderly good faith administration of justice." From *Cameron* the court drew the notion that "[t]he burden imposed . . . on those seeking to interfere is great." App., *infra*, p. 30(a). While not at all unfamiliar with *Zwickler* v. *Koota*, the trial court completely misunderstood the burden of the Courts' opinion there,[3] namely, that the exercise of federal jurisdiction over claims for declaratory relief in this context is to be the rule, not the exception.

In declining to render a judgment on the constitutional validity of the unlawful assembly ordinance, the trial court attached great significance to the fact that there were appeals pending. Any notion that this circumstance should somehow alter the principles articulated in *Zwickler* is be-

[3] See note 1, *supra*, p. 5.

trayed by the Court's opinion in *Cameron*. There, where prosecutions were pending, and where the Court found that the conditions for injunctive relief in *Dombrowski* were not met, the Court nevertheless approved the rendering of a declaratory judgment by the District Court; and in so doing, expressly reaffirmed its pronouncements in *Zwickler*. See *Cameron* v. *Johnson*, 390 U.S. at 615, n. 5.

The district court relied in significant part on *Brooks* v. *Bridey*, 274 F. Supp. 538 (1967), aff. *per curiam*, 391 U.S. 361 (1968), which merged the distinction between injunctive and declaratory relief, 274 F. Supp. at 553. The decision in *Zwickler*, which was rendered shortly after the three judge court disposition in *Brooks*, voided it of precedential force on the matter of declaratory relief.[4]

The trial court in the case at bar also found that 28 U.S.C. §2254 prevented it from rendering a declaratory judgment. Nothing in that enactment, which relates to the provision of the federal *habeas corpus* remedy to state prisoners, has any bearing on the instant case.

Finally, the trial court evoked one of the major outstanding controversies surrounding *Dombrowski*-type relief, by announcing that 28 U.S.C. §2283 was a bar to declaratory relief *vis-a-vis* the unlawful assembly ordinance. But the controversy, which has plagued the lower federal courts and which has now reached this Court, surrounds the question of granting injunctions against pending prosecutions; it has no bearing whatsoever upon the issue of declaratory relief. Section 2283 on its face speaks

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[4] This Court's *per curiam* affirmance of *Brooks* was based on *Cameron* and obviously carried with it the implicit ruling that the laws in question were not facially invalid. 391 U.S. 361.

only to injunctions, and any suggestion that it has broader impact like that in *Brooks* v. *Briley, supra*, 274 F. Supp. at 553 was laid to rest by *Cameron* v. *Johnson*, 390 U.S. at 615, n. 5; see also 390 U.S. at 637, n. 5 (dissenting opinion of Mr. Justice Fortas, with whom Mr. Justice Douglas joined).

II.

The District Court's refusal to grant declaratory relief as regards St. Louis' loitering ordinance raises important questions concerning judicial standing in First Amendment cases.

In declining to rule on petitioners' prayer for declaratory relief as regards the loitering ordinance, the trial court relied on its findings that "no sufficient live controversy" existed and that in any event the plaintiffs were unable to show that they were in immediate "danger of sustaining some direct injury." App., *infra* pp. 28a-29a. These two related concepts, which have traditionally borne the loose labels of "ripeness" and "standing," have been reconciled and explicated in two recent decisions by this Court. Under those decisions, a litigant seeking to revoke statutory provisions must demonstrate: (1) that he has "the personal stake and interest that impart the concrete adverseness required by Article III," and (2) that he is "clearly within the zone of interest protected by the act." *Barlow* v. *Collins*, 25 L. Ed.2d 192, 199 (1970); see also *Association of Data Processing Service Organization* v. *Camp*, 25 L. Ed.2d 184 (1970). Presumably, when First Amendment rights are being asserted, the zone of interest protected by the amendment is the appropriate delineation.

There can hardly be any question that plaintiffs, who are members of various civil rights, community action, and student activist groups, are within the zone of interest of the First Amendment *vis-a-vis* ordinances which allegedly impinge upon activities protected by that amendment. The only question, therefore, is whether they have the requisite personal stake and interest so as to touch their claim with "concrete adverseness."

The trial court's reluctance to review the ordinance was based upon the absence of any indication that it would be improperly employed, or employed against plaintiffs or members of their class. App. *infra*, 28a-29a. This view is both factually and legally in error. Factually it was plainly demonstrated below that petitioners and members of their class were arrested for loitering or for "failing to obey a reasonable direction of a police officer" on at least seven occasions within a three month period surrounding the filing of this suit, each such occasion involving a civil rights demonstration.[5] The specific charge of loitering was against petitioner Koch and was brought on only one occasion, but the "failing to obey" charges are every bit as relevant to the question of concrete adverseness. This is so because the only state or local law which contains any suggestion that "failing to obey the reasonable directions of a police officer" is a crime in the loitering ordinance.[6] It is so moreover, because whatever else the six "failure to obey" charges

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[5] See plaintiffs' exhibits 22, 23 and 25 which are a part of the record filed with the Clerk of the Court. For a sketch of precipitating events, see plaintiffs' statement of facts on appeal to the Court of Appeals, Eighth Circuit, App. *infra*, pp. 40a, 43a and 50a.

[6] See, plaintiffs' Statement of Facts on Appeal to the Court of Appeals, Eighth Circuit, App., *infra*, pp. 25a-26a.

indicate, they show a clear pattern of confrontation between police and protestors in which the failure to obey an officer becomes, without more, the basis for arrest. In the face of such a chronic pattern it is hard to suggest that the loitering ordinance cannot be made the object of a concrete claim by petitioners and members of their class.

But more important than this factual observation is a legal one. Key to plaintiffs' attack on the loitering ordinance is the notion that it is overbroad in First Amendment terms. The very existence of such a statute can thus chill plaintiffs and members of their class and those who might join in their protest activities. Thus, for example, suppose plaintiffs are in a demonstration in any of the places specified in the loitering ordinance and are engaged in constitutionally protected activity. The order to disperse by a police officer—and as the discussion above indicates, there is nothing hypothetical about such an order—would combine with the ordinance to seriously chill protected activity.

This suggests, of course, that the whole question of "concrete adverseness" assumes very special dimensions in the context of enactments alleged to suffer First Amendment facial invalidity. The very essence of the vice of such invalidity is in its deterrent effect on speech activities, and this is so even where there are absolutely no arrests or prosecutions under the questioned provision. See, e.g., *Baggett* v. *Bullitt*, 377 U.S. 360, 385-87 (1964); *University Committee to End War in Viet Nam* v. *Gunn*, 289 F. Supp. 469, 471-73 (1968), appeal dismissed, 26 L. Ed.2d 684 (1970); and *Carmichael* v. *Allen*, 267 F. Supp. 985, 994 (N.D. Ga. 1967).

The question of standing and appropriateness of claim has enjoyed considerable attention in recent terms of the

Court. Prior to the decisions in *Association of Data Processing Service Organizations* v. *Camp*, *supra*, and *Barlow* v. *Collins*, *supra*, the Court had undertaken a comprehensive re-examination of the standards governing standing by taxpayers. See *Flast* v. *Cohen*, 392 U.S. 83 (1968). The instant case affords an opportunity to apply contemporary perspectives on the problem of standing to a context in which it will frequently arise, namely that of First Amendment facial invalidity. *Golden* v. *Zwickler*, 394 U.S. 103 (1969), presented the question in too narrow a context to provide useful guidance. The case at bar raises it in a far more typical fashion, and its resolution here can be of great utility.

III.

The three St. Louis ordinances challenged by petitioners contain patent First Amendment defects of vagueness and overbreadth. The continuing scrutiny of municipal ordinances of this sort should commend itself to this Court.

A brief discussion of the ordinances challenged by petitioners will suffice to demonstrate that they raise grave constitutional questions. While the issues they present are far from novel, their scrutiny should commend itself to this Court. As the case at bar and numerous others which have been before the Court indicate, municipal ordinances of precisely the sort here together constitute the source of a grave and chronic threat to freedom of expression in the United States. The almost infinite variations on common themes found in the ordinances of various municipalities, the sheer number of governmental entities involved, and the relatively low penalties which attach to

such statutes (making the prosecution of appeals unlikely), combine to make constant judicial vigilence the only means of insuring First Amendment guarantees.

Section 762.030 of the St. Louis Ordinances reads as follows:

> *Disturbances*
>
> *Public disturbance of the peace.* No person shall disturb the peace of others by noisy, riotous or disorderly conduct, nor by violent, tumultuous, offensive or obstreperous conduct or carriage, nor by loud or unusual noises, nor by unseemly, profane, obscene, indecent, lewd or offensive language, calculated to provoke a breach of the peace, nor by assaulting, striking or fighting any other person in any park, street, alley, highway, thoroughfare, public place or public resort. (1948, C. 46 s. 20.)

In prohibiting "offensive . . . conduct" and "offensive language, calculated to provoke a breach of the peace," the ordinance makes criminal that which is, in substantial part, protected First Amendment activity; it is thus fatally overbroad. By making the gravamen of criminality the quality of offensiveness to others, the ordinance assimilates itself to a range of similar provisions which have been declared unconstitutional on this basis. See, e.g., *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966); *Gregory* v. *Illinois*, 394 U.S. 111, 140 (1969) (concurring opinion of Mr. Justice Black, with whom Mr. Justice Douglas joined). *University Committee to End the War in Viet Nam* v. *Gunn, supra;* and *Thomas* v. *City of Danville*, 207 Va. 656, 152 S.E.2d 265 (S. Ct. App. Va. 1967).

Section 763.010 of the St. Louis Ordinances reads as follows:

> *Unlawful Assembly*
>
> *Prohibition.* No person shall join or assemble with another person or persons to act in concert to do any unlawful act with force or violence, against the property of the City or the person or property of any other person, or against the peace or to the terror of other persons, nor make any movement or preparation for such act. (1948, C. 46, s. 20.)

This ordinance is both vague and overbroad. In prohibiting assembly to commit an "illegal act," it fails to specify whether acts considered unlawful in Civil Law terms are included in its terms. See *Landry* v. *Daley*, 280 F. Supp. 938, 955 (1968). Other of its terms are so vague as to invite official discretion ranging far beyond that which is constitutional. Thus, terms such as "against the peace," and "to the terror of other persons" are insusceptible of precise definition or containment to unprotected activity. See *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edwards* v. *South Carolina*, *supra*.

Section 765.010 of the St. Louis Ordinances reads as follows.

> *Loitering*
>
> *Prohibition.*—No person shall loiter at the corner or streets, or in the vicinity of any place of amusement, or hotel, or public building, or thoroughfare, and refuse to disperse or vacate such place when requested so to do by a police officer. (Ord. 47396, Jan. 28, 1955.)

The provision relating to refusal to disperse when requested to do so by a police officer echoes in substance and form the ordinance held unconstitutional in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965). Mr. Justice Stewart, speaking for the Court condemned that provision in the following terms:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. *Cox* v. *State of Louisiana*, 379 U.S. 536, 559, 579 (separate opinion of Mr. Justice Black). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." 382 U.S. at 90.

IV.

Petitioners' claims for injunctive and declaratory relief against the unconstitutional procedural regime in St. Louis City Court Number One pose important questions concerning the appropriateness of such relief; the District Court's resolution of those questions was incorrect.

The procedure in St. Louis City Court Number One was described by the district court in the case at bar as "slipshod" and "distasteful." See App. *infra*, pp. 14a-15a. The court, however, declined to grant either injunctive or declaratory relief relying on the alternative grounds: (1) that federal intervention was inappropriate, and (2) that police courts were still permitted to assume "a laissez-faire approach to the dispensation of justice." App. *infra*, p. 15a.

On the question of declaratory relief, the trial court failed to draw any distinction between the issue of injunctive relief and that of abstention from declaratory relief and so omitted any discussion of whether, in the terms of *Golden* v. *Zwickler*, *supra*, declaratory relief was appropriate. Absent such a finding, and any "special circumstances" justifying abstention, the situation is essentially like that in *Zwickler* v. *Koota*, *supra* and calls for reversal.

The question of injunctive relief is, of course, a more complicated one. *Dombrowski* v. *Pfister*, *supra*, is once again a good point of departure. Injunctive intervention in the state criminal process was, in ultimate terms, justified in *Dombrowski* because the allegations in the complaint depicted "a situation in which defense of the State's criminal

prosecution [would] not insure adequate vindication of constitutional rights." 380 U.S. at 28.

The situation here is, quite possibly, a more compelling case than *Dombrowski*. The possibility of a defendant in City Court Number One not vindicating his procedural rights is very great indeed, and substantially more tangible than the "chilling effect" feared in *Dombrowski*. As will be apparent below, in the discussion of the merits of the procedural regime in the city court, it is impossible for many defendants to take any appeal at all from judgments of conviction, and those appeals which as taken are not likely to be effective vehicles for the adduction of the constitutional defects of the trial procedures. Where the possibility of appeal is itself threatened by procedural defects, the vindication of constitutional rights is properly made available in the federal courts.

Of course, in addition to appeal, the state may offer post-conviction remedies. But, as will also be noted below, post-conviction remedial potential is also impaired by the defects in the procedural regime of City Court Number One. More importantly, while it is reasonable to require a defendant to pursue his constitutional claims in the course of a "prompt trial and appeal," *Douglas* v. *Jeannette*, *supra*, 319 U.S. at 1943, it is much less so to require lengthy and costly recourse to post-conviction remedies which may well prove fruitless.

Nor can a defendant's rights be ultimately redressed in the federal courts. Given the inflexible policy governing appeal bonds in City Court Number One[1] defendants whose means are limited will have served their sentences (maxi-

[1] See discussion of appeal bonds, *infra*, p. 24.

mum 90 days) long before post-conviction federal review is available. The result is not merely the impossibility of vindicating constitutional rights, it is an invidious circumstance in which the poor are selectively deprived of their right to procedural due process. Such a selective deprivation of constitutional rights intensifies the constitutional evil. See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). This selective deprivation is further compounded by the circumstance that one of the most serious claims of procedural defect is that indigent defendants in City Court Number One are not entitled to counsel at state expense.

V.

The defects in the procedural regime of St. Louis City Court Number One violate the norms of due process and equal protection; their examination will afford this Court the opportunity to enlarge upon its recent consideration of the appropriate constitutional standards for misdemeanor courts, about which there is conflict among the Circuits.

No set procedure exists in City Court Number One by which defendants, not already represented by counsel, are advised of their rights at trial. This applies to rights as basic as the Fifth and Fourteenth Amendments privilege against self-incrimination. App. *infra*, p. 14a. While there is an indication that the prosecutor on occasion undertakes to so advise defendants, nothing secures the dispensation of such advice.[8]

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[8] See the disposition of George W. Cady, which is contained in the record filed with the Clerk of the Court, at pp. 13-14.

The importance of notice to the exercise of constitutional rights need hardly be argued; it has been observed by this Court often in the context of waiver of rights, which, short of an affirmative action like the one here, is the only context in which the question can be raised. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court relied heavily upon the truism that, in order to enjoy the benefit of the privilege against self-incrimination, an individual must be aware that he is granted such a privilege by the Constitution and aware of the consequences which may follow should he choose to waive it. 384 U.S. at 464-468. See also *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The in-court situation is, of course, an *a fortiori* variant of the custodial interrogation circumstance. The failure to inform defendants of the right against self-incrimination is nothing less than a denial of that right.

In City Court Number One, where the maximum penalty is a $500 fine and 90 days in jail, an indigent defendant is not entitled to court-appointed counsel. In the Fifth Circuit, such indigent defendants would be entitled to counsel upon an extension of the equal protection and due process principles of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Harvey* v. *Mississippi*, 340 F.2d 263 (5th Cir. 1965); *MacDonald* v. *Moore*, 353 F.2d 106 (5th Cir. 1965); and *Gostin* v. *Thomas*, 400 F.2d 594. In the Eighth Circuit, the only detailed Court of Appeals consideration of the issue expressly left open the question of the minimum requisite penalty and left the issue to turn on *ad hoc* "consideration of all circumstances relative to the question" *Beck* v. *Winters*, 407 F.2d 125, 130 (8th Cir. 1969). In the case at bar, however, the Court below summarily affirmed the trial court's firm de-

termination that $500 and 90 days is too short a sentence to invoke the fundamental guarantee of the right to counsel.

In *Baldwin* v. *New York*, 26 L. Ed.2d 437 (1970), the line for constitutionally required jury trials was drawn at six months. See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). But in many respects, the right to counsel is, in this context, a far more fundamental one. It is, to borrow a phrase otherwise intended, a right "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). This Court has recognized as much in requiring that indigent accused by given counsel at state expense before responding to custodial interrogation. *Miranda* v. *Arizona*, *supra*. It would be anomalous, in light of *Miranda*, to say that because only three months of incarceration hang in the balance, a defendant is required to make trial decisions, including the possibility of waiving the right to remain silent without the benefit of counsel. Moreover, if there are ever to be effective appeals, or post-conviction remedial proceedings, on constitutional grounds from misdemeanor convictions, surely the assistance of a lawyer at trial is essential. To expect a layman to identify, much less preserve, his constitutional claims at the trial stage without the benefit of counsel is to expect too much.

Finally, a trio of procedures combine to make it virtually impossible for the indigent defendant, or any defendant who is without legal counsel, to appeal his conviction. First, the Court does not inform the defendant that he has a right to appeal, although, allegedly, the marshal "usually" undertakes this function. App., *infra*, p. 15a. Second, the defendant must file a notice of appeal and a $2.00 filing fee "before sundown on the close of court" on the day of his

conviction. App., *infra*, p. 16a. Third, bond on appeal is inflexibly set at twice the amount of the fine, or where jail time is time invoked, at a figure between $500 and $1000." The net effect, of course, is to make appeals available primarily to those of means who have secured the services of an attorney, in stark contravention of *Douglas* v. *California*, 372 U.S. 353 (1963). The inflexible determination of bond on appeal, made by the marshal, and wholly unconnected in amount with the future appearance in court of a defendant, suffers additional constitutional infirmities. See *Bandy* v. *United States*, 364 U.S. 477 (1960); *Stack* v. *Boyle*, 342 U.S. 1 (1951).

VI.

The Trial Court's factual determination that there was no pattern or practice of bad faith law enforcement and prosecution was so clearly erroneous as to require reversal by this Court.

Petitioners' case below was supported by four days of testimony by more than thirty witnesses, the depositions of four other individuals, and some thirty-odd exhibits. The evidence of various incidents of police and prosecutional abuse as set out at length in Petitioners' Statement of Facts on Appeal to the Court of Appeals, Eighth Circuit (see App., *infra*, pp. 40a-62a) was uncontradicted.

The factual findings of the trial court as regards bad faith enforcement and prosecution are clearly erroneous, as can be determined by this Court upon examination of the

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* See deposition of George W. Cady, which is included in the record filed with the Clerk of the Court, at pp. 20-21.

record, which has been filed with the Clerk of the Court. This Court should overturn those findings and grant the relief which was denied on their basis.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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October 28, 1970

APPENDIX

Opinion of the United States District Court, Eastern District of Missouri

The plaintiffs herein have instituted this action seeking certain injunctive and declaratory relief against an alleged scheme, plan or conspiracy to deprive them and members of their class of their civil rights under color of law, and in addition attack the constitutionality of three ordinances of the City of St. Louis. Jurisdiction is based upon the provisions of 28 U. S. C. A. 1343. The action is maintained under 42 U. S. C. A. 1981, 1983 and 1985.

Plaintiff, Charles Koen, was at the time of this litigation "Prime Minister" of a voluntary association of Negro-Americans known as the "Black Liberators". The complaint describes the organization as one with a "militant outlook". Plaintiff, Percy Green, is and at all relevant times has been the chairman of ACTION, a voluntary association of both whites and Negroes whose stated primary purpose according to the complaint has been the economic improvement of members of the Negro race primarily through the elimination of racial discrimination in hiring and employment practices, although the evidence presented at the trial of this matter indicates it is a militant group sponsoring and participating in purported civil rights activities far beyond the pleaded purpose. Plaintiff, Richard P. Koch, is a member of a loose-knit organization commonly known as Students for a Democratic Society (SDS), and holds the office of "Coordinator" within the membership of the Washington University chapter of that organization. From the pleadings and evidence it is not entirely clear as to what the precise outlook or aims of that chapter of SDS are. Plaintiff, Joel Allen, was at the time of filing a

member and officer of an organization called McCarthy for President, and at the same time was a member of SDS.

These four individuals sue in their own behalf and "pursuant to Rule 23 of the Federal Rules of Civil Procedure as a class action, on behalf of other citizens who, like plaintiffs, belong to organizations which it is alleged are unpopular with defendants, and who have participated and wish to continue participating by speech and conduct in activities which are controversial and unpopular with defendants but nevertheless lawful • • •."

The defendants, Long, Harrison, Walsh, Gates, Cervantes, Sanders and Rogers, constitute the past and present Board of Police Commissioners of the City of St. Louis, and under the provisions of § 84.010 et seq., R. S. Mo. 1959 are charged with governing the police department of the City of St. Louis. Defendant, Curtis Brostron, is the Chief of Police of the City of St. Louis. Defendant, Frederick J. Grimes, is a lieutenant in said police force, presently stationed in the Ninth District of the City of St. Louis. Defendant, Thomas Shannon, is the prosecuting attorney for the City of St. Louis, and in such capacity is charged with the duty and power to prosecute violations of state misdemeanor statutes which occur within the city, § 56.490 and § 479.100 R. S. Mo. 1959. Defendant, Gary Gaertner, is the city counselor for the city, and under the ordinances and charter thereof is responsible for the prosecution of violations of the ordinances of the city. Defendant, George W. Cady, is a judge of the City Court of St. Louis, presently presiding in Court No. 1. Defendant, Richard Brown, is a judge of the Court of Criminal Corrections which has jurisdiction involving state misdemeanors and is the appellate court for appeals from judgment of the City Courts.

The essence of the complaint with respect to injunctive relief is found in the fourth paragraph. That paragraph with its sub-parts charges a concerted and conspiratorial plan and scheme to deprive plaintiffs of certain specified rights as follows:

> "Defendants, • • • and others with whom they have acted in concert and conspired, have deprived, and unless enjoined by this court will continue to deprive, plaintiffs • • • of their constitutionally guaranteed rights to • • • and engage in other lawful activity which is unpopular with defendants. This deprivation has been accomplished in the course of a deliberate, concerted and continuing harassment under color of law including the following actions:
>
> "a. • • •
>
> "b. • • • ."

Following said allegations and specific examples of the activities involved, in paragraphs 6 and 7 the plaintiffs allege certain agency relationship and again urge conspiracy with the existence of a pattern and practice designed to intimidate and harass.

The second thrust of the complaint deals with the alleged unconstitutionality of three ordinances of the City: § 762.030, Public Disturbance of the Peace; § 763.010, Unlawful Assembly; and § 765.010, Loitering.

Finally, plaintiffs allege irreparable injury and the lack of an adequate remedy at law, seeking to thus invoke federal equitable and declaratory powers.

A hearing on the requested preliminary injunction was held on October 18, 1968, and was continued on the 21st and 22nd of that month, and after receiving evidence

there presented and upon oral argument of counsel, this court in an oral opinion refused to issue the preliminary injunction. On March 3, 1969, the final hearing on the permanent injunction and upon the merits of the declaratory relief was held and additional evidence was adduced. Upon request of parties time was granted within which to file briefs, which both sides have done.

The evidence presented by the plaintiffs was as broad as their complaint. It consisted basically of testimony concerning 17 arrests over a three-year period, 1966 to March, 1969; 4 other incidents; police search practices and other forms of alleged intimidation; and the procedures employed in City Court No. 1. The evidence lends itself to a breakdown into three major categories: Arrests and claimed police search practices together with other claimed illegal harassing actions; procedures and conduct at and before trials in City Court No. 1; and plaintiffs' attack on the three ordinances heretofore mentioned.

Before considering the evidence presented in these areas generally, several preliminary matters are raised by the defendants. First, all of the defendants, jointly, attack the maintenance of this suit as a proper class action under Rule 23, Federal Rules of Civil Procedure. Rule 23, insofar as applicable, provides:

> "(A) One or more members of a class may sue • • • on behalf of all only if (1) the class is no numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims • • • of the representative parties are typical of the claims • • • of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

As stated by the Advisory Committee, one of the purposes of the 1966 amendments of this rule was to enable the institution of a class action "where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration.*" 28 USCA Rule 23, 1967 Supp. Of course, the elimination of the pre-existing three types of categories also was designed to clearly place all class actions within the purview of the rules of res judicata.

In support of the propriety of the class action as alleged, plaintiffs cite many cases: *Lankford* v. *Schmidt*, 240 F. Supp. 550, aff'd 364 F. 2d 197; *Green* v. *Department of Public Welfare, etc.*, 270 F. Supp. 173; *Cypress* v. *Newport News General Hospital Association*, 375 F. 2d 648. In each of these cases the *allowed* class was both large and to a certain extent indefinite and incapable of specific enumeration. However, in each of these cases it was perfectly clear what the membership of the class was, and certainly the class involved did not depend on the state of mind of the particular individual.

In *Chaffee* v. *Johnson*, 229 F. Supp. 445, aff'd 352 F. 2d 514, cert. den. 384 U. S. 956, the court stated:

> "• • • The complaint described the alleged class as all persons who are workers for the end of discrimination and segregation in Mississippi, for the encouragement of the exercise by Negroes in Mississippi of their right to vote and to register to vote, and for the exercise and preservation of civil rights generally in Mississippi. Clearly this is not a proper class action. The vague and indefinite description of the purported class depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within or

without the alleged class. The members of a class must be capable of definite identification as being either in or out of it."

The deficiency here urged by the defendants is precisely this one stated in *Chaffee*. Such a defect is even more pronounced here where membership in the class is dependent both upon the state of mind of the particular individual involved and upon the state of mind of the particular defendant involved in a situation in which it is perfectly apparent that the defendant's individual opinions as to any given organization may differ.

In the opinion of the court nothing in the 1966 amendments to Rule 23 was designed to allow the inclusion of the type of class here described. With the clear applicability of res judicata to all class actions, the ability to identify any given person as a member of the class takes on an even greater importance. Therefore, this court is of the opinion that the action cannot be maintained as a class action with the class remaining as described. See also, *Giordano* v. *Radio Corporation of America*, 183 F. 2d 558.

This does not mean, however, that the action itself cannot be maintained as a class action, but rather that the class description must fail. A proper class was shown to exist under the evidence presented at the trial. Such a class consists of the members of ACTION, represented by Percy Green; the members of the Black Liberators, represented by Charles Koen; the members of SDS, represented by Terry Koch and Joel Allen; and the Zulu 1200's, based upon testimony of some of its members. The court finds that a class so constituted clearly exists and under the evi-

dence present a class so constituted would specifically qualify under the express provisions of Rule 23.

It will, therefore, be ordered that the class action described in the complaint be dismissed as an improperly described class, and that in conformance with Rule 15(b) that the pleadings be conformed to the evidence presented, the pleadings are hereby ordered conformed to describe the class action as found to exist by the court from the clear evidence presented.

Second, the defendants, Cady, Brown, Shannon and Gaertner, urge that by virtue of their respective positions as judges and prosecuting attorneys they are totally immune from *all* suits under the civil rights act, section 1981 et seq. In so raising this defense, they rely on the Supreme Court's decision of *Pierson* v. *Ray*, 386 U. S. 547, and other similar cases. See, e.g., *Bauers* v. *Heisel*, 361 F. 2d 581, cert. den. 386 U. S. 1021.

Of course, such a proposition would be obviously applicable if the plaintiffs sought damages in this action. Here, however, plaintiffs have asserted the inadequacy of the remedy at law and seek injunctive and declaratory relief. Defendants cite no case in which the common law doctrine of judicial immunity, as discussed in *Pierson*, has been extended to suits requesting purely equitable relief. Indeed, the very rationale of the *Pierson* decision stands against them. Indeed, in the history of the common law, judges and other quasi-judicial officers have been held subject to equitable and quasi-equitable actions—for example, writs of mandamus and prohibition.

In the opinion of the court the rationale of *Pierson* does not extend to cover the case at hand. The case law supports this proposition. See, e.g., *Smith* v. *Hill*, 285 F. Supp. 556.

Indeed, just three weeks after the final hearing on this matter, the Supreme Court in *Hadnott* v. *Amos*, 394 U. S. 358, issued a temporary restraining order against a state court judge, and on final hearing reversed the district court's refusal to grant a permanent one. Under the necessary rationale of *Hadnott*, the defense here urged must fail. See also, *Ex Parte Virginia*, 100 U. S. 339 (1880).

Before proceeding to the bulk of the cause the court will first examine the evidence relating to the defendants Shannon and Brown. A careful examination of the whole record before the court reveals a sum total of evidence dealing with Judge Brown of near zero. His very name was mentioned only once or twice. There is absolutely no evidence in the record at all which would place this defendant within the purview of this complaint. In short, there is a total failure of proof on the allegations of the complaint. Indeed, some of the evidence that does exist points to the fact that Judge Brown reversed, on appeal, convictions which form part of the complaint directed against Judge Cady.

It will, therefore, be ordered and decreed that the motion to dismiss renewed by the Honorable Richard Brown at the close of the testimony in the case and upon which the court reserved ruling, is sustained, and this cause of action is dismissed as to defendant, the Honorable Richard Brown, at plaintiffs' costs.

The evidence relevant to the defendant Shannon has a somewhat greater volume but similar content. In subject content is limited to participation in two events described and complained of over the three years herein involved. First, on the evening of September 7, 1968, a rally was held at Sheldon Memorial in the city. On that evening following certain inflammatory speeches (Plaintiffs' Ex. 19 con-

tains police officers' description of those speeches), Chief Brostron conferred with Shannon by telephone (Brostron Depo. pp. 21-27). After receiving information, Shannon by telephone authorized the issuance of seven warrants (Plaintiffs' Exhibit 32b) charging violations of § 562.160, R. S. Mo. 1959. These state warrants were issued and executed concurrently with city warrants charging violations of § 763.010, Revised Code of the City of St. Louis. The next day, however, upon receipt of further information, Shannon refused to in fact issue four of the warrants for the reason of insufficient evidence (Plaintiffs' Exhibit 32a). Warrants were issued for Koen, Hutchins and Dent. An information was filed and the case went to trial in the Court of Criminal Corrections, resulting in an acquittal.

Second, on December 18, 1966 (Tr. 315-17), Percy Green was arrested on the charge of assaulting a police officer (among others). Such offense is a felony under § 557.215, R. S. Mo., and as such was without the jurisdiction of the defendant. The Circuit Attorney (not a defendant herein) presented the matter to the Grand Jury, which returned an indictment for common assault, a misdemeanor, § 559.220, R. S. Mo. Then in accordance with the law the Circuit Court certified the indictment to the Court of Criminal Corrections, at which time Shannon became involved. Of course, by this time the matter had already been considered by one prosecuting official and by the Grand Jury which had found probable cause. Shannon tried Green and an acquittal resulted.

This is the sum and substance of the evidence relating to Shannon for the three-year period. It is clearly insufficient to make a case under the allegations of the complaint. No evidence of participation in any plan or scheme or action exists. In view of the Grand Jury indictment and the

certification in the second incident, the prosecution was obviously undertaken in good faith. Only the first described incident is relevant to the plaintiffs' charges. Rather than show bad faith, this action prima facie demonstrate the contrary. Good faith enforcement is presumed and the force of that presumption is great. *Dombrowski* v. *Pfister*, 380 U. S. 479; *Zwickler* v. *Koota*, 389 U. S. 241; *Cameron* v. *Johnson*, 390 U. S. 611. The burden is upon the plaintiffs to overcome this presumption, and upon the record here they have failed to do this.

It will, therefore, be ordered and decreed that the motion to dismiss renewed by Thomas Shannon at the close of the testimony in the case, and upon which the court reserved ruling, is sustained, and this cause of action is dismissed as to defendant, Thomas Shannon, at plaintiffs' costs.

The court now proceeds to the various sub-parts of the controversy.

I. Procedures and Conduct at, Before and After Trial in City Court No. 1, Judge G. Cady Presiding

The first area of attack within this category is the bail practice and procedure used. Bail in the city courts here is governed by the Missouri Rules of Procedure, Rule 37.01 et seq.

Rule 37.15 governs admissions to bail and in accordance with the Missouri Constitution, Art. 1, § 21, provides that the judge, clerk or any peace officer "when authorized by law" shall admit the accused to bail. The word "peace officer" is defined so as to include police officers and marshals, Rule 37.05, but it is clear that the judge retains the ultimate authority.

However, the whole bail procedure may be by-passed under Rule 37.09 which provides for the issuance of a sum-

mons instead of a warrant "if the judge or prosecutor has good reason to believe that the accused will appear in response thereto." Further, in any case where "it is lawful for an officer to arrest a person without a warrant, he may serve such person with a summons instead of arresting the accused."

In traffic cases, Rule 37.46 provides for the exclusive use of the Uniform Traffic Ticket (see Rule 37.1163 for the form thereof). This ticket incorporates the summons device instead of the arrest procedure. However, under Rule 37.466 it is clear that a more detailed information may be filed and hence by reference the arrest-bail procedure is available.

In *Pilkinton* v. *Circuit Court of Howell County, Missouri*, 324 F. 2d 45, 46 (8th Cir. 1963), the court stated:

> "• • • contrary to earlier cases • • •, the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment."

Plaintiffs ask this court to hold unconstitutional the practice of requiring bail from persons charged with violating city ordinances, but who have no history of non-appearance. It is their contention that the evidence establishes that bail is being used as a means of non-judicial punishment, thus depriving those arrested of due process and equal protection of the laws.

First, it is clear that the prohibition involved in the constitution is merely against excessive bail. No court has yet held that the Eighth Amendment or any other affords a basis for claiming a constitutional right to be released in any given situation without bail or on one's

own recognizance. See, e.g., *Pilkinton*, supra; *Mastrian v. Hedman*, 326 F. 2d 708, cert. den. 376 U. S. 965.

It is also clear that bail is not excessive merely because the defendant is unable to pay it or because the cost of obtaining same is high. See, e.g., *Hodgdon v. United States*, 365 F. 2d 679, cert. den. 385 U. S. 1029; *New York v. Hutchinson*, 360 F. 2d 759.

Bail and the amount thereof are, of course, susceptible to misuse. Where as here an alternate non bail procedure is available, misuse by selective employment is quite possible. Bail has only one legal purpose, insuring the defendant's presence at trial. *Bandy v. United States*, 364 U. S. 477; *Stack v. Boyle*, 342 U. S. 1. It must, therefore, be set in amount at a level calculated to assure the presence and this amount must of necesssity turn upon the facts and circumstances present in the case. See, e.g., *Stack v. Boyle*, supra; *United States v. Weiss*, 233 F. 2d 463; *Forest v. United States*, 203 F. 2d 83; *United States ex rel. Rubinstein v. Mulcahy*, 155 F. 2d 1002.

Under the evidence present as to the setting of bail, there is no basis in fact for a determination that there has been a denial of due process or equal protection, nor a general violation of the Eighth Amendment in relation to plaintiffs and their class. Much testimony was forthcoming as to the amount of bail set in the various cases discussed and of the general failure of the court, the police and the marshal to use the alternate summons procedure. But none of the credible evidence points to any of the circumstances surrounding the setting of the bail amount in relation to the need to assure presence at trial. In view of the present state of the law that recognizance is not required even with a history of no non-appearance, more must be shown than relatively high bail figures.

Except for the one occasion of the Centennial Church demonstration of December 8, 1967, there is no evidence to demonstrate the number of times in similar situations in which the alternate summons procedure is used or not used so as to create any evidence of selective discriminatory employment of either procedure.

It is clearly not the function of this court to enforce the rules of the Supreme Court of Missouri. The writs of mandamus and prohibition, and here habeas corpus, are available within that system to quickly and efficiently enforce and police the applicable rules regarding bail. Bail being totally dependent upon the individual circumstances of a case is not an area in which general declarations are possible. An injunction by this court would serve only one purpose and that would be the impermissible substitution of this court as the arbitrator of all future bail disputes in city court. Under the evidence here presented, giving an insufficient picture of the circumstances governing bail, an intrusion into city and state judicial systems would be both unwarranted and intolerable.

The second area of attack is the procedure employed before and during the trial of a cause in City Court No. 1. Two witnesses, Messrs. Gutherie and Hopper, and Judge Cady's deposition form the evidentiary basis for this statement.

Mr. Gutherie, commander of the Zulu 1200's, was arrested on one evening and taken to the local district station. Being unable to make bond, he was held over. The very next morning he was transferred to Central Headquarters and then taken to the cell behind City Court No. 1. The docket was called and then Gutherie was brought into the court room. The charge was read to him by the clerk. No one informed him of any right to counsel, to

obtain a continuance for the purpose of obtaining an attorney, or to prepare for his defense. He entered a plea of not guilty and the city put on its case. At its conclusion, the prosecutor told him that it was not necessary that he take the stand and testify.

Mr. Hopper, who was arrested at the Chase-Park Plaza on the occasion of a speech of Clark Clifford, then Secretary of Defense, did make bail and after several city-obtained continuances, was brought to trial. He was represented by an employed attorney. A demand was made for a jury trial—as allowed by Missouri Rule 37 and by § 175.000, Revised Code of the City of St. Louis—but said demand was refused.

Judge Cady testified that (1) no written court rules exist (a prima facie violation of Missouri Rule 37.03); (2) that he is guided by the City Ordinances in the conduct of his court (but § 172.010 et seq. governing city court operations cannot be said to contain any procedural guides); (3) that no set procedure exists by which accused persons, not already represented by counsel, are advised of any of the basic procedural rights which are theirs, such as the ability to make bond, continuance, change of venue, fifth amendment privileges, etc.; (4) that usually the marshal or the prosecutor does tell the defendant about these items, although on occasion he himself did. Now it is clear that many defendants in Judge Cady's court in fact do exercise all of these rights all the time. But at best the approach in City Court No. 1 to basic procedural fairness is slipshod.

The state of the applicable constitutional law now existing is such that very little due process is carried down to the level of the city police court. Absent a work-off fine provision, the length of sentence which can be im-

posed is too short to constitutionally require a jury trial as a "serious offense" ($500 and 90 days as the maximum punishment). Nor is the appointment of counsel a necessity on this level. In fact, a laissez-faire approach to the dispensation of justice still exists in the police courts. While such an outlook is distasteful, sheer volume may require its continuance. This court is not disposed upon the evidence presented in this record to alter such a system as here exists, nor will this court under the evidence here presented interpose itself.

The testimony shows no greater injury to an accused than is normally concomitant with the criminal judicial process. Thus no irreparable injury has been shown. *Dombrowski*, supra, at 485. Certainly, once again the state and not the federal judiciary is the appropriate agency to enforce state rules (which would obviate the constitutional challenges urged), absent clear and convincing evidence of a clear and immediate danger of irreparable injury. See, *Golden* v. *Zwickler*, 394 U. S. 103.

The third area of controversy in relation to the city courts deals with appeals and appeal bonds. What has heretofore been stated in relation to bail in general is equally applicable here. Although it does seem to be inflexible, the policy announced in relation to appeal bonds does not under the evidence warrant intervention.

However, the appeal procedure requires greater investigation. Here again the evidence demonstrates that the marshal *usually* informs the defendant of the appeal procedure and procures the necessary forms. In this case, it is rather clear that the court has the clear duty to carefully inform each convicted defendant of the precise appeal rights present, or else to provide him with a written

description of those rights. *Douglas* v. *California*, 372 U. S. 353.

Appeals from the city police court are taken to the Court of Criminal Corrections, § 479.110, R. S. Mo. That section provides for the use of the procedures set forth in § 543.290, which requires an affidavit of appeal (see Rule 37.1171 for the form), and then requires, within ten days, perfection of said appeal, including the payment of a two-dollar transcript fee. But § 479.110 adds a further requirement, as it states: "• • • except that application for appeal shall be filed immediately after judgment." This precise wording has never been interpreted by an appellate court in this state. In 1882, operating under a similar but different statute, in *City* v. *Krieger*, 11 Mo. App. 587, an appellate court in a memorandum opinion required a same-day filing of the application. However, since the laws of 1873 several changes have been made in this statute. The result is that in spite of the time passage, an unwritten practice has developed which requires the filing of the application the same day as the conviction—to use Judge Cady's words, "before sunset or the close of court."

While such a practice if strictly followed would perhaps be subject to criticism, there is no evidence that it has been strictly enforced. There is no evidence an appeal sought to be taken at a later time was denied.

The final area of controversy within this subject area deals with two facets of the court's operation: (1) Purported convictions without evidence to support them, and (2) sentences (fines) allegedly "grossly disproportionate to the sentences imposed upon others for the same or similar offenses."

Of course, a criminal or quasi-criminal conviction devoid of evidentiary support is violative of due process. *Thomp-*

son v. *City of Louisville,* 362 U. S. 199; *Gregory* v. *City of Chicago,* 394 U. S. 111. In such a situation, correction of that deprivation is readily available in the appellate processes of the state, especially where as here, the appeal results in a trial de novo. Contrary to plaintiffs' rather fanciful interpretation of the evidence, it is not implicit that any totally innocent person has been convicted by Judge Cady in a devoid-of-evidence situation. From the credible evidence presented, the most that can be said is that Judge Cady generally believed the police officers, while often on appeal in the Court of Criminal Corrections the jury did not. Certainly nothing here warrants intervention. If this court could on the record here intervene, then in all arguably invalid conviction situations, the federal courts could be forced to become the appellate courts for the state. See *Douglas* v. *City of Jeanette,* 319 U. S. 157, 164.

The plaintiffs attack Judge Cady's sentencing. Plaintiffs' Exhibit 16 is a chart showing all of the convictions (on the relevant charges) in Judge Cady's court for the period July through September, 1968. It shows the fines imposed, the amount stayed, the net fine and jail time. It does not identify the offenders other than by name; it does not describe the conduct which resulted in conviction; it does not show any racial distinction nor any membership or lack thereof; it does not differentiate between conviction and pleas; and most importantly, it fails to reflect prior record or the lack thereof. One thing it rather clearly shows: All of the fines imposed within this period were within the limits set by the ordinances of the city and that, therefore, each fine was presumptively legal.

Much like the bail situation, the sentence imposed by a judge depends upon the peculiar facts and circumstances

surrounding the individual case and the individual defendant himself. Imposition of sentence reposes in the sound exercise of judicial discretion, governed by the limits imposed by the relevant ordinance. If the sentence imposed is within this limit and jurisdiction otherwise exists, it is a legally permissible sentence even though it may well be harsh.

In the opinion of the court, to even warrant considering this charge the plaintiffs are required to demonstrate that the sentences imposed are in fact disproportionate, which they have failed to do; and further, that the difference is the result of a constitutionally void motive, bias or prejudice by the judge. Because of the obvious deficiencies in the chart (Exhibit 16) and the resulting averages therefrom, there is a total failure of proof on the initial element. Further, the sole evidence of motive is found in Judge Cady's deposition, wherein he testified that he is in sympathy with civil rights leaders and activities (p. 29) and that he does not distinguish between defendants upon the basis of label, militants, etc. (p. 28). Further, it should be noted that no irreparable injury is possible here due to the fact that plaintiffs can always utilize the devices of a change of venue and a disqualification of the judge to avoid Judge Cady. Plaintiffs' contentions here are totally without merit.

II. Police Practices and Prosecutions

This broad area encompasses the majority in number of the plaintiffs' complaints and the basis of their attempt to demonstrate the existence of the conspiracy and plan or scheme of concerted action alleged in the complaint (par. 467).

Of the 31 witnesses who testified, most were concerned with this area of controversy. In dealing with this area it must be remembered that by and large the objectivity of the witnesses lacked any objectivity, and furthermore, a great deal of their combined testimony was based upon hearsay and otherwise generally not overly reliable.

In turning to the testimony itself we first look at the testimony insofar as the four plaintiffs in this action is concerned.

While there is repeated reference in the testimony to the plaintiff, Charles Koen (the Prime Minister of the Black Liberators) and his activities, he did not testify.

The testimony of the plaintiff, Percy Green (Chairman of ACTION), disclosed that he was arrested on December 18, 1966, charged with assault on a police officer, resisting arrest of a traffic violation, and peace disturbance. The arrest arose out of an alleged traffic violation. He was tried in this case, convicted, appealed, and after the appeal, was tried in the next higher court and acquitted.

On June 7, 1967, he was arrested for interfering with a police officer and peace disturbance, was tried, convicted, appealed, and then pled guilty. In the fall of 1968, he was arrested as a result of activities at Kiel Auditorium at the time of the Veiled Prophet Ball, charged with failure to obey a reasonable police order. This charge was set for trial after his testimony in the present case.

Green's testimony discloses that he has been very active in organizing and participating in demonstrations in the City of St. Louis. The testimony indicates that when these demonstrations were planned, the news media was immediately called and were usually present. Testimony further discloses that the police were present, and although he participated in many, many demonstrations he was

only arrested three times in the three-year period; that he pled guilty to one of the charges, was acquitted as to one, and the third is still pending. The testimony with respect to his arrest that occurred within the last year at Kiel Auditorium disclosed that Green and his ACTION guerrilla force went to Kiel Auditorium to demonstrate at the Veiled Prophet Ball; that they were told by the police that they could do their picketing on the opposite side of the street from the entrance, which they did for some time, and nothing occurred. According to one of the witnesses, Franklin Leming, Jr., a reporter of the Post-Dispatch, the Negro Veiled Prophet, his queen, and Reverend Witte, crossed the street and went to the door and sought admission to this private party. Admission was denied. They went back across the street, where they remained for sometime, and then at about 8:10 p.m., when the street in front of the entrance was crowded with people going in, they, including Green, went back across the street and were told by Chapman, one of the police officers, to go back across the street to do their picketing, which they did not do, but proceeded to start an argument, and they were arrested. The testimony discloses that Green and his group, the ACTION guerrillas, have picketed many openings such as that of the Powell Symphony Hall and other events, without incident, the police always being present, and it was only after disturbances, often violent in nature, with respect to the picketing that in rare instances arrests were made.

One need but have listened to the testimony of Green to come to the conclusion that his attitude was one of belligerency, seeking to create strife, turmoil and trouble, rather than peaceful picketing.

The third plaintiff, Richard R. Koch, the Coordinator for SDS, had participated in at least fifty demonstrations in St. Louis in the last three years, and had been arrested twice, once for loitering, in December of 1967, which was dismissed, and which arose out of picketing at the Chase Hotel where Vice President Humphrey was speaking. The other arrest was in December of 1966, when he and a group were demonstrating in front of the president of the police board's house and were taken to the station, but he was released without bond and nothing further occurred.

The fourth plaintiff, Joel Allen, Student Coordinator for the St. Louis area for McCarthy for President, a member of SDS, a member of the peace movement, and a member of the American Civil Liberties Union, has participated in many demonstrations in the St. Louis area, but has never been arrested. He was removed from the Arch area on one occasion when he was distributing literature for McCarthy and told that he would have to move four blacks back from the area since he could not distribute political literature within four blocks of a federal highway. The police accompanied him, holding onto his arm, for the four blocks, and then left him to carry on his literature distribution. He complained that the policeman called him a hippie, a nasty name, and asked when he last took a bath. This witness stated that he knew of no threats of arrest and had never been arrested, that he didn't represent either of the other parties in the lawsuit and none of them represented him, and that he had no authority to represent anyone.

Of the remaining 28 witnesses, over half of them had never been arrested for anything and knew little, if anything, about the arrests of others. Three ministers testified. Reverend Roger A. Harless, a Presbyterian minister

with Presbytery, who was the adviser and chief money raiser for the Black Liberators, had been stopped by the police on one occasion after he had driven around two or three blocks several times late at night and asked if he were lost.

Reverend Robert Wilden, a minister of the Second Presbyterian Church, was the chief advisor and money raiser for the Zulu 1200's, and Reverend Walter Witte, Episcopalian minister, was one of the chief advisers and money raisers and a member of ACTION.

Of the three ministers, Reverend Witte was the only one who had actively participated in any number of demonstrations. He had participated in at least fifty demonstrations and had been arrested only once, and that occurred at Kiel Auditorium, the Veiled Prophet incident referred to above. He testified that the police didn't bother them as long as they remained on the opposite side of the street where they were told to stay, and were only arrested after they crossed the street and the incident referred to above occurred. He further testified that only once in the many demonstrations in which he participated had there been a threat of arrest, and that in the last year in the demonstrations in which he had participated police had never threatened to arrest him. He stated that he was in favor of the members of the various groups here carrying firearms, which is rather unusual.

Of the balance of the witnesses who were arrested, a substantial part of the arrests were on charges not involved in any of the three ordinances referred to in the complaint, and for the most part dealt with interfering with police officers, traffic violations, which in most instances the witnesses admitted were proper and to which they pled. One of the witnesses, Gutherie, did not even

complain of the arrest and his conviction, but only of the court procedure. A number of the arrests were peace disturbances, but the arrest had nothing whatever to do with demonstrations.

The record is totally devoid of any evidence to support the allegations of the complaint. No credible evidence supports the existence of any agreement, in fact, tacit, or otherwise by implication, to do or cause to be done the acts complained of.

Because of the plaintiffs' shotgun approach in the complaint, they have placed themselves in a difficult position. Under the *Cameron* decision, to warrant this court's intervention into the state (city) criminal process plaintiffs must prove by the preponderance of the credible evidence that the situation in St. Louis is one of the "impropriety of (city officials) invoking the statute (ordinance and practices) in bad faith to impose continuing harassment in order to discourage appellants' activities." This they have failed to do. This record before the court is for the most part testimony concerning the events leading up to the arrests, prosecutions, and other harassing acts of the police. However, taken at face value, with the knowledge of their objectivity, on each occasion the person arrested was engaged in activities which could arguably constitute a violation of the ordinance involved. In view of these facts and the rule that the question before the court is not the guilt or innocence of the person charged, but rather only the good faith or bad faith of the activities of the police, it must be held that the plaintiffs have failed in their proof.

"Ordinarily, the presumption that the State's motive was law enforcement and not interference with speech or assembly will carry the day." *Cameron* v. *Johnson*, supra, at 618. Cases such as *Lankford* v. *Gelston*, 346 F. 2d 197;

Williams v. *Wallace*, 240 F. Supp. 100; *Monser* v. *Hill*, 278 F. Supp. 920; and *Cottonreader* v. *Johnson*, 252 F. Supp. 492, do not require the contrary result. In each of these instances, the evidence of bad faith was clear and convincing, and it was apparent that the activities involved were police policy designed entirely to suppress the plaintiffs' activities. The evidence in the present case does not rise to that standard.

Plaintiffs' evidence here shows a total of arrests on 17 occasions (each unrelated) during the three years about which testimony was adduced. Of these 17, only arrests on 8 occasions related arguably to exercise of first amendment rights. Of these arrests, most were based on the peace disturbance ordinance. At the same time, the evidence from witnesses such as Allen, Koch and the Reverend Witte demonstrates that there were during the same period of time literally hundreds of "civil rights demonstrations" which occurred from the evidence without incident.

Plaintiff Allen, although long active in this area, has never been formally arrested. Plaintiff Koch has been arrested twice over the last three years, and on both occasions the charges were not prosecuted after police consultation with the city counselor's office. Plaintiff Green has suffered three arrests. Two of these arrests relate to first amendment exercises, the first on June 7, 1966, at a street rally after he and others had piled trash in the city streets. Ultimately, Green entered a plea of guilty in the Court of Criminal Corrections to the charges arising out of this incident. The second was at the Veiled Prophet Ball held on September 27, 1968, at which time Green was arrested when he attempted to gain entry without a ticket. That case has not yet been disposed of.

Other witnesses testified to other arrests and/or detentions. Some complained of police refusal to accept

complaints on police misconduct. A few witnesses testified that police had followed them, implying some sinister purpose.

Other attempts at proving harassment and intimidation are illustrated by the evidence presented which may indicate the presence of heavily armed policemen in the area of the Wall of Respect during a rally there on September 7, 1968. Assuming the presence, it appears that such evidence demonstrates only police preparedness in view of the context in which it occurred, namely, the attack by persons unknown upon the Ninth District Police Station; the attack on the home of Lieutenant Grimes; the arson of Commissioner Gates' office; and the fire and disturbance at 2810 Easton, the headquarters of the Black Liberators. As a matter of fact, the testimony of Wayne Washington, a general of the Black Liberators, testified that on September 7, 1968, at the Wall of Respect, Dent, one of the Black Liberators, was present with an automatic weapon that looked like an M-16, that he had a .38 revolver in his pocket, that the Black Liberators were armed and protecting Adam Clayton Powell, and the court takes judicial knowledge of the fact that in the case of *United States* v. *Joseph Major Thomas*, 68Cr 224, a case before this court, after this incident the defendant therein, a Black Liberator, pled guilty of being in the area with a sawed-off rifle, and he pled guilty only after he was confronted with a picture from one of the newspapers showing him in the street with the rifle. No evidence adduced indicated any police interference with the conduct of this rally nor was any chilling effects demonstrated. Indeed, it must be kept in mind that only impermissibly motivated chilling is unconstitutional.

Further, much time and transcript space is devoted to testimony relating to the incidents of September 4th and 5th at 2810 Easton, during which period the car of the Black Liberators was destroyed by fire, and shots and/or rocks were thrown through the windows and certain items disappeared from the inside. The plaintiffs take Exhibits 26, 27, 28, 29, 30 and 31, and the testimony of two firemen and one witness, Wright, and urge that the composite demonstrates that these incidents were a police retaliation from the attacks on the station, Lieutenant Grimes and Commissioner Gates. On the contrary, the absolute most that the credible evidence shows is that the car did burn; that someone unknown shot or threw rocks through the windows, that a police van and several policemen, including Lieutenant Grimes, arrived on the scene in response to the fire report and a report of gun shots, and an inference from Plaintiffs' Exhibit 4 that police entered the building and seized as evidence certain items, namely a flag, bullets of an M-1 rifle, arrows and a crossbow. The witness Wright's purported identification of Lieutenant Grimes as the person firing the shots is ludicrous, as revealed during cross-examination.

The police conduct described in this record is far more compatible with a sincere, good faith effort to prevent riot and fight crime than with that urged by plaintiffs. The area in which most of the incidents occurred is one of the high crime areas of this city (Deposition of Bronstron). If overzealous reaction is apparent on the record in some cases, it is only because of the situation in which, of course, police officers are found to be only human. The appearance of testimony that certain police officers have resorted to insult and profanity, and to rough handling of recalcitrant suspects, which acts are contrary to the

standing orders of these defendants (Deposition of Bronstrom, p. 4), is not sufficient to warrant federal judicial intervention.

A federal injunction dealing with state law enforcement is an extraordinary remedy. It requires much to induce its use. Plaintiffs have here failed to make the necessary showing of bad faith enforcement for the purpose of harassment and chilling required. They have failed to show the required irreparable injury under *Cameron*, or of the special circumstances that would warrant federal disposition of the normal pattern of law enforcement.

For these reasons, this court must deny to plaintiffs the relief requested in their complaint in respect to the alleged conspiracy and plan or scheme of concerted action to deprive plaintiffs of their constitutional rights. Plaintiffs have failed to prove their allegations.

III. City Ordinances

Plaintiffs seek a declaratory judgment as to the constitutionality of three ordinances of the City of St. Louis and further seek an injunction to prevent their future enforcement.

In *Zwickler* v. *Koota*, supra at 254, the Supreme Court stated:

> "It follows that the District Court's views on the question of injunctive relief are irrelevant to the question of abstention here. For a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the

declaratory relief irrespective of its conclusions as to the propriety of the issuance of the injunction."

The law so enunciated has been made even more certain by the court's approval of the District Court's action on remand in *Cameron* v. *Johnson*, supra at 615, footnote 5, wherein on remand the district court first proceeded to render an appropriate declaratory judgment.

In the *Zwickler* case, the District Court there likewise issued a declaratory judgment. Thereafter, in *Golden* v. *Zwickler*, supra, the Supreme Court reversed, holding the case to be one inappropriate for such action. It follows that guided by the two *Zwickler* cases, this court must determine the appropriateness and the merits of this request.

(1) *Loitering*, § 765.510.

The evidence presented at trial reveals only one incident in which a party or member of the class was arrested or threatened with arrest under this section. That was the plaintiff Koch at a demonstration in the vicinity of the Chase-Park Plaza Hotel on the occasion of a visit by Vice President Humphrey on December 8, 1968. The charge was, however, later dismissed. No other evidence was presented as to the actual or threatened use of the ordinance. "The mere possibility of erroneous application of the statute does not amount to 'irreparable injury to justify a disruption of orderly state proceedings.'" *Cameron* v. *Johnson*, supra.

In *Golden*, supra, the court stated, l. c. 110: "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." See also, *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*,

312 U. S. 270, 273; *Ewers* v. *Hunger*, 358 U. S. 302; *U. P. A. W.* v. *Mitchell*, 330 U. S. 75, 89-90; *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39; *United States* v. *Raines*, 362 U. S. 17, 21 (all cited with approval in *Golden*).

The same principle was stated in a slightly different manner in *Frothingham* v. *Mellon*, 262 U. S. 447, 448, when the court stated that the power exists to declare a statute unconstitutional only where the plaintiff is "able to show, not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining some direct injury as a result of its enforcement." See also, *Barrows* v. *Jackson*, 346 U. S. 249.

In view of these standards, this court is of the opinion that under the evidence presented in this case, in relation to this ordinance, it is inappropriate for declaratory relief. There is no reason to believe that the state court system in this state is incapable or unwilling to apply the appropriate federal constitutional standard as enunciated in *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, to this section of the Revised Code should the occasion arise for its enforcement. More specifically, no sufficient live controversy exists in the language of *Golden*, nor does a sufficient threat of enforcement appear to warrant intervention under the rule of *Dombrowski*.

(2) *Unlawful Assembly*, § 763.010.

In this instance, four members of the class were arrested on September 7, 1968, for violation of this ordinance. They were convicted in City Court No. 1 and their consolidated cases are now pending on appeal in the Court of Criminal Corrections. Therefore, in this part, the specific live grievance and the immediate danger of injury do exist.

Under the above situation the issue is apparent: Does the language of the Supreme Court in *Dombrowski*, supra at 489, where it stated, "We hold the abstention doctrine is inappropriate for cases such as the present one where • • • statutes are justifiably attacked on the face as abridging free expression," require this court to interject itself into the midst of the orderly administration of state court procedure which has reached the appellate stage?

While this ordinance is different from the state statute on the subject, § 562.130 recently sustained by a three-judge court in this district, *Rollins* v. *Shannon*, 292 F. Supp. 880, 889, and is subject to some constitutional doubts, and while further doubt exists as to its validity under the Missouri decision of *Pooley* v. *City of Cape Girardeau*, 224 S. W. 2d 388, there are three basic reasons why the above stated issue must be answered in the negative.

In *Dombrowski* the Supreme Court noted that it was peculiarly inconsistent with the basic principles of federalism for the federal judiciary to interfere with the orderly good faith administration of justice. The language of the case, particularly as interpreted in *Zwickler* and *Cameron*, is tempered and cautious. The burden imposed by *Cameron* on those seeking to interfere is great. The court finds that on the record this burden has not been met in relation to this ordinance. As previously noted in this opinion, the mere possibility of an erroneous application is not sufficient. Of the four members of the class charged and convicted, only Mr. Washington testified. To say the least his testimony did not establish any semblance of irreparable injury sufficient to warrant interposition in the state proceedings at the appellate level. No evidence demonstrates that this prosecution has "chilled" any First Amendment rights or freedoms. No evidence points to the exist-

rence of any plan or scheme to use the ordinance to so curtail those precious rights. There is no evidence of threats of future prosecutions. In short, the court finds that upon the record insufficient evidence exists to warrant intervention. Of course, a declaratory judgment is within the sound discretion of the court, 28 U. S. C. A. 2201. In view of the principles of comity and federalism applicable to our dual court systems, an exercise of such discretion for intervention would be particularly repugnant to our system. See generally, *Brooks* v. *Briley*, 274 F. Supp. 538, aff'd 391 U. S. 361.

Second, to grant the relief prayed for in relation to this section of the Code would have the effect of releasing the four individuals from state custody. In the view of this court this would constitute an unauthorized extension of 28 U. S. C. A. 2254 dealing with release of prisoners from state custody.

Finally, the court is of the opinion that the clear provisions of 28 U. S. C. A. 2283 stand as a bar to both the purely equitable and the declaratory relief requested. The Supreme Court in *Dombrowski* and *Cameron*, was careful to not rule on this precise issue. Opinion among the lower courts is split. Several district courts and the Fourth, Sixth and Seventh Circuit Courts of Appeal have ruled that section 2283 is such a bar and that sections 1983 and 1985 are not exceptions thereto. See, e.g. *Baines* v. *City of Danville*, 337 F. 2d 579, cert. den. 381 U. S. 939; *Sexton* v. *Barry*, 233 F. 2d 220; *Wojcik* v. *Palmer*, 318 F. 2d 171, cert. den. 375 U. S. 930. Four district courts and the Third Circuit have reached the contrary result. *Cooper* v. *Hutchinson*, 184 F. 2d 119; *Carmichael* v. *Allen*, 267 F. Supp. 985.

This court agrees with the majority view as expressed by *Brooks* v. *Briley*, 274 F. Supp. 538, 553, aff'd 391 U. S. 361, wherein it was said:

> "The weight of authority and the better reasoned approach require that Section 2283 prohibits the enjoining of these state proceedings and that Section 1983 is not an 'expressly authorized' exception to Section 2283. To hold otherwise would be to create a vast exception to Section 2283 and would do violence to the principles of comity and federalism which underlie it * * *. Furthermore, it is clear that the prohibition under Section 2283 against enjoining state court proceedings cannot be avoided by seeking a declaratory judgment. H. J. Heinz Co. v. Owens, 189 F. 2d 505, cert. den. 342 U. S. 905. The same principles of comity and federalism require that when injunctive relief is not appropriate, neither is relief appropriate under the declaratory judgment statute."

Thus, no federal intervention by way of injunction nor by way of declaratory judgment would be appropriate here.

(3) *Public Disturbance of the Peace*, § 762.030.

Here, as in the case of the unlawful assembly ordinance, it is clear that the specific live grievance and fear of direct injury exist. This ordinance has been on the books for many, many years; there have been many arrests and prosecutions under it; and from the evidence it appears that there will be more. It should be borne in mind, however, that the facts in this case clearly indicate that this ordinance has not been used for the purpose of abridging

free expression or applied for the purpose of discouraging protected activities. Various witnesses, as previously set out, have participated in as many as fifty or more demonstrations, and the most that any of them were arrested was once.

The testimony discloses that the police were present at most, if not all, of the hundreds of demonstrations referred to in the testimony, and they made no efforts to do other than to see that the demonstration was orderly, and in some instances to protect the demonstrators. The record indicates when we considered the activities of the various witnesses that the demonstrations in which they were involved were many and varied and the most that they could come up with as to arrests arising out of demonstrations for the violation of this ordinance were eight arrests over a three-year period. Details with respect to those arrests show that the arrests were not made to prevent demonstrations but only after demonstrations got out of hand and the police to prevent further trouble stepped in. The record with respect to demonstrations clearly shows that hundreds have taken place in St. Louis in this three-year period with the police in attendance, without incident. There is no testimony of threats by the police of arrests with respect to demonstrations.

The court in *Douglas* v. *Jeanette*, supra, at 164, had this to say: "It does not appear from the record that petitioners have been threatened with any injury other than incidental to every criminal proceeding brought lawfully and in good faith."

This language is applicable to the situation before the court. No person should be immune from prosecution in good faith for his alleged criminal acts. Great reliance is placed by plaintiffs on *Dombrowski*, supra, but the Su-

preme Court in that case cites the *Douglas* case, supra, with approval, and as I read the case requires special circumstances which have a chilling effect upon the exercise of First Amendment rights to exist in order to make the abstention doctrine inapplicable. This court finds no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the cause of a criminal prosecution. The evidence demonstrates that this ordinance has not been used for the purpose of a chilling effect upon the exercise of First Amendment rights, the basis for this court injecting itself into their constitutionality as referred to in *Dombrowski*, supra.

In line with *Douglas*, supra, since this ordinance has not been used as a chilling effect to First Amendment rights, it is an appropriate case for the abstention doctrine set out in *Douglas*, supra. There are many cases filed under this ordinance and there are cases pending under this ordinance, as the exhibits indicate. What has been said in this connection with respect to the other two ordinances is equally applicable as to this one. The most that can be said in criticism of the ordinance would be that some of the words are vague, and while the court in view of its abstention in this matter does not deal with the ordinance in detail, attention is invited to *Zwickler* v. *Boll*, 270 F. Supp. 131, aff'd 391 U. S. 353.

This memorandum opinion is adopted by the court as its findings of fact and conclusions of law, and the clerk will prepare and enter the proper order dismissing the action and giving judgment to the defendants herein. Costs will be taxed in full against the plaintiffs.

ROY W. HARPER
U. S. District Judge

Opinion of the United States Court of Appeals—Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 19,571 and 19,868.

CHARLES KOEN, et al.,

Appellants,

v.

ISAAC LONG, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 30, 1970.]

Before:

VAN OOSTERHOUT, *Chief Judge*;
MEHAFFY and LAY, *Circuit Judges*.

PER CURIAM.

This is an appeal by the plaintiffs, Charles Koen, Percy Green, Richard P. Koch and Joe Allen, from a final order entered after trial on the merits dismissing the plaintiffs' petition for injunctive relief against certain police,

prosecution, and court practices, and a declaration that certain St. Louis ordinances are unconstitutional. The defendants are various city officials, prosecutors, police officers and judges from the city of St. Louis.

Jurisdiction was based upon 28 U.S.C. § 1343. The action was maintained as a class action to protect federal substantive rights guaranteed by 42 U.S.C. §§ 1981, 1982 and 1985.

This case was tried without a jury to Chief Judge Harper, who in a lengthy and well-considered opinion reported at 302 F.Supp. 1383 properly states the applicable law and demonstrates that his factual determinations are based upon substantial evidence. The plaintiffs on this appeal have failed to demonstrate that the trial court committed reversible error.

We affirm on the basis of the trial court's opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgments Below

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19571 September Term, 1969

CHARLES KOEN, PERCY GREEN, RICHARD P. KOCH and JOEL ALLEN,

Appellants,

vs.

ISAAC A. LONG, WILLIAM H. HARRISON, EDWARD J. WALSH, JR., CLIFTON W. GATES, ALPHONZO J. CERVANTES, CURTIS BROSTRON, FRED GRIMES, THOMAS SHANNON, GARY GAERTNER, HON. GEORGE CADY and HON. RICHARD BROWN.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court of October 22, 1968, be, and is hereby affirmed.

June 30, 1970

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 19868 September Term, 1969

Charles Koen, Percy Green, Richard P. Koch and Joel Allen,

Appellants,

vs.

Isaac A. Long, William H. Harrison, Edward J. Walsh, Jr., Clifton W. Gates, Alphonzo J. Cervantes, Curtis Brostron, Fred Grimes, Thomas Shannon, Gary Gaertner, Hon. George Cady and Hon. Richard Brown, James L. Sanders and Vincent G. Rogers,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

June 30, 1970

Costs taxed in favor of appellees, Long, Harrison, Walsh, Gates, Sanders, Rogers, Brostron, Grimes and Carvantes:—	
Cost of printing 25 copies of brief of appellees, Isaac Long, et al.	**$133.25**
Total costs of appellees, Long, et al.	**$133.25**
for collection in the U. S. District Court	

Petitioners' Statement of Facts on Appeal to the United States Court of Appeals— Eighth Circuit

This suit was brought to enjoin the St. Louis Metropolitan Police Department, the City Counselor and the City Courts from continuing practices which have deprived appellants and other persons in their class of constitutionally protected freedoms, and to declare certain City Ordinances unconstitutional. The evidence included testimony from the leaders of almost all known civil rights and student activist groups in the area. In addition to the plaintiffs-appellants Percy Green (Chairman of ACTION), Charles Koen (Prime Minister of the Black Liberators), Richard P. Koch and Joel Allen (members of SDS, ACLU, and the McCarthy for President Committee), there was testimony from Solomon Rooks, a former Chairman of CORE, Clarence Guthrie, the Commander of the Zulu 1200s, Frank Boykin, an official of the Tandy Area Council, Martin Liebowitz, an editor of the Free Press, Dr. Bobby Westbrooks, the Chairman of the Montgomery Hyde Park Neighborhood Council, Oeie Pastard, Executive Director of the Mid-City Community Congress, and a number of other persons who belong to these organizations, or who wished to participate in activities with these organizations, or who were mistaken for members of these organizations by the appellees.

Two things need to be emphasized at the outset. First, much of the testimony offered by appellants was given by disinterested witnesses—for example, newspaper reporters, a television commentator, a Viet Nam war veteran—who had no personal interest in the case and no connection

whatsoever with the appellants. Indeed, some of the crucial testimony was given by two city firemen who jeopardized their job security and advancement potential just by testifying; neither of them had any connection with the appellants.

Second, it also needs to be emphasized that appellants' evidence stands uncontradicted, unrebutted and unexplained. On the contrary, much of the crucial testimony is confirmed by the appellees' own depositions and records, which are in evidence as plaintiffs' exhibits. The sole question in this case, therefore, is whether the uncontradicted facts established by appellants entitle them to the relief they seek.

Those practices of appellees which have deprived appellants and members of their class of constitutionally protected freedoms have taken a variety of forms. The practices put at issue in this suit were: arrests made without probable cause of persons who were innocent of any offense for purposes of harassment and intimidation; other forms of harassment and intimidation short of arrest, including wilful failure to provide police protection; unlawful seizure and deliberate destruction of property; the unconstitutional use of bail; wilfully initiating or continuing prosecutions of innocent persons; the use of court procedures designed to deprive persons of every element of due process of law; and the imposition of grossly discriminatory sentences. It was to be expected that appellants' evidence would concern many diverse incidents. Hence in the interests of convenience and an orderly presentation, this statement of facts is divided into sections, as follows: 1. Police Practices; 2. Prosecution Practices (which includes an account of how the three ordinances claimed to be unconstitutional are employed); 3. Use of Bail; 4. City Court Procedures;

5. Judge Cady's Discriminatory Sentences; and, 6. Appellees' Aims and Purposes.

1. *Police Practices.* This section is divided into two parts, the second of which deals solely with the evidence concerning the destruction of the Black Liberator Headquarters in the early morning of September 5, 1968. The first part deals with all of the other incidents involving police.

(a) The first instance appearing in the record of an arrest without probable cause of a person engaging in an unpopular demonstration occurred in September 1966 when appellant Koch and fourteen others were arrested for picketing the home of the then president of the Board of Police Commissioners. No charge was ever filed against Koch as a result of this arrest (A. 103). However, an unidentified "official of the St. Louis Police Department" later used the incident as an excuse to pass unproven, hearsay allegations to the FBI agent who investigated Koch's request for a conscientious objector classification. (Pl. Ex. 18; see p. 5 of the "Resume of Inquiry", which is attached to the letter to Koch's Appeal Board.)

Appellant Green, Chairman of ACTION, was arrested without cause on December 8, 1966 (A. 255-64). He was insulted, physically abused, and finally charged with assaulting a police officer (a felony), general peace disturbance and interfering with an officer, and 12 or 13 traffic violations (A. 260). He was required to post a bond of $1,000 for the felony, plus $1,500 for the other charges. After Green had been acquitted of a number of the charges during three trials, the remaining charges were dropped. This arrest began with a police officer looking at Green's driver's license, and saying "So you're the Perey Green" (A. 255).

Three members of ACTION were arrested without cause at a demonstration protesting the Veiled Prophet Ball on October 6, 1967 (A. 225-27). All three were charged with general peace disturbance and failure to obey the request of a police officer (Pl. Ex. 25). The charges were dropped after the three persons and their witnesses made several court appearances (A. 228). *Post-Dispatch* reporter Frank Leeming, describing the same incident (A. 238-40), testified, "when they got them into the cruiser, and the cruiser left, I went up to [Assistant Police Chief] Chapman and asked him what the charges were, and he said, 'We'll charge them with police—peace disturbance, inciting to riot, and whatever the hell else we want to,' is the way he put it" (A. 240).

Two months later, on December 8, 1967, six persons in the company of appellant Allen were arrested simply because they attempted to display signs supporting Sen. Eugene McCarthy at a church where then Vice-President Hubert Humphrey was scheduled to appear (A. 142-50). These persons remained in custody during the afternoon, and were finally released after being issued "courtesy summonses" for peace disturbance (A. 150). (Still pending at the time of the hearing in this suit, these charges were later dropped.) Appellant Allen was insulted by a police officer who demanded to see his driver's license and draft card during the course of this incident (A. 149-50).

That evening, appellant Koch was arrested without cause while engaging in a demonstration at the Chase Hotel where Vice President Humphrey was scheduled to speak (A. 98-103; 153-55). The arrest was made when Koch attempted to secure the name of a police officer who had cursed him (A. 101; 153-54). He was charged with "loitering" and "failure to obey directions of a police officer" (Pl.

Ex. 22). Koch was released a few hours later after a $250 bond had been posted (A. 102). The charges were nolle prossed by the City after an attorney had appeared for Koch (A. 102-03; Pl. Exs. 21 and 22). Allen and Koch's fiance were followed in a marked police car when they left the demonstration (A. 155).

Early in 1968, appellant Green and other members of ACTION were threatened with arrest and death by members of the Police Department while engaging in a demonstration at the opening of the Powell Symphony Hall (A. 272-73).

On May 24, 1968, appellant Koch was participating in a demonstration in front of the Mart Building, where physical examinations for, and inductions into, the armed forces are held (A. 104-05; 108-09). Numerous police officers stood by doing nothing while occupants of the building threw garbage and trash down onto the demonstrators; the Department's sole effort at law enforcement on this occasion was to threaten one of the demonstrators with a citation for jaywalking when the demonstrator crossed the street to complain about the failure of the officers to try to stop the rain of debris (A. 105).

A week later, on May 31, 1968, Secretary of Defense Clark Clifford was scheduled to speak at the Chase Hotel. Arrested that evening were Solomon Rooks, Chairman of CORE, Ralph Taylor (A. 217-19), and Myles Hopper, an assistant professor at the University of Missouri (A. 372-75). Rooks was arrested inside the hotel when he attempted to purchase a ticket to the dinner Secretary Clifford was to address. As Rooks and Taylor were being led out of the hotel, a scuffle started between Taylor and some officers. Taylor was thrown to the floor, handcuffed, and then Mace was sprayed into his eyes (A. 218-19). Hopper,

who was on his way out of the hotel after being refused a ticket to the dinner, saw what was happening to Taylor and exclaimed, "My God, they're macing him! They're macing a handcuffed man!" (A. 373; 387-88). At that point he, too, was placed under arrest. Rooks was charged with general and individual peace disturbance for his action of trying to purchase a ticket for Secretary Clifford's speech (A. 217-18; Pl. Ex. 20); reporter Leeming, who was covering the event for his newspaper, testified there was no disturbance at the ticket desk (A. 241). Rooks was required to post a bond of $500 (Pl. Ex. 20). Hopper was charged with individual peace disturbance and interfering with an officer for his indiscreet exclamation, and was required to post a bond of $250 (Pl. Ex. 20). The first charge against Hopper ultimately was abandoned by the City; he was acquitted of the second charge (A. 376-77). (These proceedings are described in greater detail in section 4, *infra.*) Hopper was not a member of any organization except the Boy Scouts; he simply had wanted to participate in the demonstration and buy a ticket to hear Clifford speak (A. 383).

The following month, the Police Department began a campaign to have Ocie Pastard removed as executive director of the Mid-City Community Congress. Pastard had conducted a mock-trial of the department as a means of protesting the killing of a young girl, Monica Hollingshead, by police officers (A. 465). Shortly thereafter, members of the department began volunteering to the Mid-City Board of Directors the information that Pastard had a police record; the campaign against Pastard is described in the testimony of Frank Kopecky (A. 282-84) and the Reverend Robert Wilden (A. 284-99). The testimony makes plain that the reason for the Department's activity was not Pas-

tard's record—which consisted of one misdemeanor conviction for the illegal sale of alcohol, and one period of questioning about narcotics, no charges resulting (A. 291)—but rather because he had organized the Community Alert Patrol to investigate police activity while he was working in Los Angeles (A. 291-92). Appellee Long's deposition supports the testimony of witnesses Kopecky and Wilden (A. 629-35).

A few weeks later, on July 4, 1968, appellant Allen and other members of the McCarthy for President organization were prevented from distributing campaign literature to a crowd which had gathered at the Arch on the riverfront. Allen had called the Department the preceding day to make sure the distribution of literature was permissible; he was told that it would be, provided the area was not littered (A. 156-57). Nevertheless, he was insulted and forcibly ejected from the riverfront area on the 4th by a police officer who told him it was "illegal to pass out campaign literature within four blocks of a federal highway" (A. 158). When Allen attempted to file a complaint with the Police Department about his treatment, he was put through an elaborate rigamarole which came to nothing (A. 159-61).

On the 23d of the same month, Dr. Bobby Westbrooks, Chairman of the Montgomery-Hyde Park Area Association, was stopped for a traffic violation (A. 450-53). The officers, however, were more interested in whether he and his passengers were members of CORE or ACTION than in the offense. Dr. Westbrooks was threatened with arrest if he refused to permit his automobile to be searched (A. 453).

On August 30, 1968, Solomon Rooks was arrested again and charged with peace disturbance and interfering with an officer because he had tried to file a complaint about

the mistreatment by police officers of a young boy (A. 219-20).

At about 6:30 p. m., September 4, 1968, appellant Koen and three other Black Liberators, including Dolan Chapple and Willie Taylor, were riding in an auto which was being followed and was finally stopped by police officers (A. 175-81). The occupants were first told they were being held for a "records check" (A. 180) but they were finally charged with peace disturbance (A. 181; Pl. Ex. 26). Television commentator Bill Fields, who happened to be on the scene, testified there was no disturbance (A. 202-03). Fields was threatened with arrest while watching the incident (A. 202). Koen and the three others were held in jail overnight and released the following morning (Pl. Ex. 26).

Later in the evening of September 4, a person or persons unknown fired into the ninth district police station, into Lieutenant Fred Grimes' home, and threw a fire bomb into the office of Police Commissioner C. W. Gates. Although there was no evidence to connect any of these incidents to the Black Liberators, Lt. Grimes ordered the arrest of a number of persons in the vicinity of the Liberator headquarters at 2810 Easton (A. 552-54); he also ordered the "round-up of all known militants" (A. 557), and issued instructions to "lock up all known associates of the Black Liberators" (A. 562). As a result of appellee Grimes' dragnet, 15 persons were arrested within the next 12 hours or so, and charged with four felonies: arson, firing into a dwelling (two counts) and firing into a public building (Pl. Ex. 28). Among those caught in the dragnet and so charged were Dolan Chapple and Willie Taylor, who had been in jail at the time of the incidents, as a result of the previous arrest, and therefore could not have been guilty of them (Pl. Ex. 28).

Still later that night, or early in the morning of September 5, appellee Grimes fired shots through the windows of the Liberator headquarters, and a squad of police officers demolished the headquarters, burned the Liberators' car, and seized a large quantity of material from inside the headquarters. (These events are covered in detail in part (b) of this section, *infra.*)

Appellant Koen was turned over to the custody of St. Louis County police at 10:30 in the morning of September 5 (Pl. Ex. 26). Upon his release without charge by the County Police, appellee Grimes, without a warrant or any other colorable pretext of justification, seized Koen, handcuffed him, put him in his car, drove him around, and finally took him to his home, where Koen eventually was released when a television newsman appeared to interview Grimes. This is the testimony of appellee Grimes himself (A. 540-41).

Later in the day of September 5, the Liberators called a rally at the "Wall of Respect" to protest the events of the preceding 24 hours. Between 100 and 200 people attended the rally (A. 204), which was orderly and peaceful (A. 205, 242). Nevertheless, an enormous number of police officers, armed with Thompson sub-machine guns and other lethal weapons, which were displayed openly, surrounded the gathering in automobiles, in windows and on rooftops (A. 241). Plaintiffs' Exhibits 5 through 12 graphically portray the menacing display seen by people at the rally (A. 205-07). The individuals shown on the exhibits were identified as police officers (A. 208-10; 569). Television commentator Fields was "shocked" and "intimidated" by what he saw (A. 204-05); reporter Leeming testified that people "were upset because of the armed force that was present in the neighborhood" (A. 242).

Two nights later, on September 7, 1968, an assembly was held at the Sheldon Memorial, at which a number of persons spoke. The meeting was placed under heavy police surveillance by Chief Brostron (A. 587). How heavy and intimidating this surveillance was is indicated by the testimony of the witness Harry Colbert (A. 121-25). Colbert was stopped after discharging passengers who wanted to attend the meeting. When he objected to a search of his automobile, six additional police cars surrounded him. Under threat that he would be arrested and his car towed, he submitted to the search. He was finally released without charge. Meanwhile the meeting was proceeding as scheduled; the speeches were described by *Post-Dispatch* reporter Timothy Bleck (A. 114-21). After the meeting ended and the crowd was dispersing peacefully, appellee Brostron received a call from a police officer who had been in attendance; following a short consultation with Prosecuting Attorney Shannon, appellee Brostron ordered the arrest of "the people that did the speaking, and who had spoken with inflammatory remarks" (A. 587). Seven persons were arrested as a result of this directive and charged with unlawful assembly (Pl. Exs. 32a and 32b). Three of them (Washington, Herron and Scales) had not spoken. Bond was set at $1,000 apiece (Pl. Ex. 24, where the charge is said to be "riots"). Four of the seven were tried and convicted by appellee Cady two days later (Pl. Ex. 19). Appeals, pending at the time of this hearing, have since resulted in reversals. (The "trial" in appellee Cady's court is considered at greater length in section 4, *infra*.)

The following day, September 8, a meeting was held at Mid-City Community Congress to discuss the recent events. Frank Boykin, a community organizer for the Tandy Area Council, attended (A. 413-19). Persons at the meeting

heard that those arrested for unlawful assembly the night before were about to be released, and decided to go to Central District to "be there when they got out" (A. 415). One of these persons, Rosa Hilliar, was stopped before she had gone a block. When Boykin inquired about the reason for the stop, the police officer threatened him with arrest and summoned additional police cars (A. 415-16).

Another arrest of appellant Koen and a second Liberator, on September 13, 1968, is referred to in the depositions of appellees Long and Broston (A. 593-95; 646-50). The two Liberators suffered severe injuries as a result of this arrest. No direct evidence was offered with respect to the incident, however, because felony charges of assaulting an officer were pending at the time of the hearing. The depositions do reveal that the defendants-appellees, Board of Police Commissioner, offered the policemen involved a chance to take summary punishment for using excessive force; the policemen refused. After a conference with the Governor the charges against the policemen were dropped for an indefinite period for the stated reason that their pendency would interfere with the prosecution of the Liberators.

On September 27, 1968, appellant Green and two other members of ACTION were arrested while attempting to picket the Veiled Prophet Ball (A. 269-71). They were charged with "failing to obey a reasonable direction of a police officer," and bond on each was set at $150 (Pl. Ex. 23).

On October 17, the day before this hearing was scheduled to commence, the witness Marvin Chambers was driving an automobile in which appellant Koen was a passenger. The car was followed by a police motorbike, and was stopped allegedly for running a red light, although another

car behind Chambers' followed him through the intersection and was not stopped (A. 245-47). Additional police were summoned, Chambers and the other occupants were searched, and all were taken to Central District. Chambers' bond was first set at $50; when it was discovered he had $30 in his possession, the bond was increased to $250. The only charge was violation of a red light.

Three days later, during the weekend recess in the hearing for a preliminary injunction, William Helmreich, a graduate student, was arrested at 11 a. m. while walking on the street with three Liberators dressed in their "uniform" (A. 308-19). He was questioned about his connections with the Liberators, insulted, and searched (A. 310). Taken to Central District and put into a cell, he was released at approximately 1:30 p. m. that day, October 20 (A. 309-10). No charge was ever filed.

Finally, there is the pathetic testimony of decorated Vietnam war veteran Alvin Eugene Black (A. 420-30), who committed the crime of being mistaken for a Black Liberator (A. 427). Stopped while driving an automobile, Black was villified with racial epithets and searched, as was his car. When he asked, after 40 minutes, why he was still being detained, his head was split open for an answer. He then was charged with three traffic violations, resisting arrest and individual peace disturbance (A. 427). Sergeant Black tried to file a complaint about his treatment with the Department (A. 428-29); he learned, as had appellant Allen and the witness Rooks before him, that this was a futile gesture.

Such was the relationship between the St. Louis Metropolitan Police Department and the appellants and members of their class at the time this suit was brought.

(b) Destruction of Liberators' Headquarters, Sept. 4-5, 1968. Russell Wright testified as follows: he got off work at midnight September 4 and went to the Living Room Lounge for a beer. The Living Room Lounge is across the street from 2810 Easton, Liberators' headquarters. He arrived at the Lounge at approximately 12:30 in the early morning of September 5 (A. 72-73). After having one beer, he and some friends were standing in front of the Lounge at about 1 or 1:15 a. m. (A. 67; 79) when an unmarked car with two occupants (A. 74) stopped; a shot or shots were fired from the car into the Liberator headquarters (A. 68; 78) and the car drove away. About five minutes later (A. 78), the car appeared again, stopped again, and again shots were fired from it into the headquarters (A. 68; 78-79). At this point, Wright and a friend, Robert Thomas, saw some acquaintances pull into a filling station across the street from the Lounge and two or three doors east of 2810 Easton, and they crossed the street to speak to them (A. 79-80). Wright and Thomas then began walking up the street towards 2810 Easton when a police officer approached from their rear and said, "You two were around. You saw the whole thing, so you're under arrest" (A. 83). Shortly thereafter, the unmarked car from which the shots had been fired appeared again and parked near the front of 2810 Easton; the occupants disembarked, at which time Wright recognized one of the occupants as appellee Grimes (A. 76, 80-81), whom Wright has "seen "off and on just about all my life" (A. 73). Grimes walked up to the windows of 2810 Easton and said, who threw rocks through the windows? (A. 74-75, 92.) Grimes then turned and walked towards Wright and his companions (A. 81). Grimes addressed the group, talking about the shooting up of his home and the police station, and saying,

"I'm going to kill you all, or you all are going to kill me one" (A. 71, 81-82). Grimes then called Wright "a bunch of bad names, asked me what I was doing there, did I belong to the Black Liberators" (A. 70). (Wright is not a member (A. 74).) Grimes then told him to "get on up the street" (A. 70), and Wright and Thomas left. The time was approximately 1:45 a. m. (A. 69, 84), and Grimes was still addressing the group of people Wright had crossed the street to talk to when Wright left (A. 72, 82). Wright and Thomas walked to Wright's home, a distance of two blocks. Remembering they had left Thomas' car unlocked, they returned to the car which was parked on a lot from which 2810 Easton was visible. It was approximately 2 a. m. He saw "a tow truck from Metropolitan there and some men standing around" (A. 84-86).

The trial judge characterized this testimony as "ludicrous" (A. 500). On the contrary, with the inevitable exception that defendant Grimes denied firing into 2810 Easton, Wright's testimony is confirmed at every point by Grimes' own deposition and by police department records. Wright testified that the person he later identified as Grimes first appeared upon the scene at approximately 1 a. m. According to his own testimony, Grimes left the Ninth District station, went home for 15 or 20 minutes and then returned to the station at this hour (A. 547-8); thus he has no witness as to his whereabouts at this time. Wright testified that Grimes asked who threw rocks through the windows of 2810 Easton. Asked at deposition whether there had been a shooting, Grimes volunteered: "Well, when we got there, we found a couple of windows broken out in the place. I don't know whether it was ever determined that—how it was done, whether it was done by shots or whether someone had thrown bricks or rocks

through the place or not" (A. 555). There was "a hole in each one of the plate glass windows, two plate glass windows" (A. 559). This latter testimony matches that of Wright (A. 92). (Grimes testified that he and other officers had gone to 2810 Easton in answer to a radio call for a shooting (A. 549-50). Upon arrival he found the situation described above. Note, however, that the radio dispatch ticket relating to this call (Pl. Ex. 30, ticket No. 3780296) shows a callback within three minutes reporting that the call was "unfounded no victim, no witness." This in the face of Grimes' own testimony concerning the damage, and in the face of the fact to be developed momentarily that there were plenty of people in the area, including Wright, who could have been questioned.)

Wright testified that his acquaintances in the filling station whom Grimes addressed included Alonzo Chapple, Charles King, and Mr. Guthrie (A. 90). Grimes testified that he saw a number of people in the vicinity of 2840 Easton upon his arrival, and "ordered the arrest of all of them" (A. 552). Plaintiffs' Exhibit 28 lists the names of nine persons arrested at that time in that place; three of the names are Clarence Guthrie, Alonzo Chapple, and Everett King. (It might be noted that appellants did not come into possession of Exhibit 28 until long after Wright's testimony.) Grimes testified that a car was towed (A. 556), a fact confirmed by Plaintiffs' Exhibit 28 (which contradicts Grimes testimony as to who owned the car, however). Wright testified that he saw a "tow truck from Metropolitan" at the scene at approximately 2 a. m. (A. 86). The only real dispute, therefore, is whether the person Wright saw fire into 2810 Easton was or was not appellee Grimes. As to that, Wright testified that he had seen Grimes "off and on just about all my life" (A. 73).

It will be useful to summarize here the areas in which there is no disagreement in the testimony. Wright testified that, at approximately 2 a. m., just before he went home the second time, the only damage to 2810 Easton were the holes in the windows, and that the further damage reflected in Plaintiffs' Exhibit 2 had not yet occurred (A. 88, 89, 92); he further testified that the Black Liberators' automobile was parked parallel to the curb in front of 2810 Easton and did not appear to be damaged (A. 69) as it later was (Pl. Ex. 1). Grimes' testimony coincides precisely with that of Wright (A. 559-61). Further, Grimes testified that no property had been taken from the premises at the time he left (A. 561). That this is accurate information is confirmed by the police report, complaint number 378122 (part of Pl. Ex. 27). That report shows that police were called to 2810 Easton at 2:35 a. m. for a "shooting." "Upon arrival at 2810 Easton officer's observed subject Clayton standing in front of 2810 Easton bleeding about the face, wearing no shirt, socks or shoes." "Further investigation in area to no avail" (both quotes from p. 2). Nowhere in this report is there a single word about any damage to 2810 Easton, which would have been an obvious line of inquiry had the premises then been in the condition reflected in Plaintiffs' Exhibit 2.

There are two curious features. If appellee Grimes is telling the truth when he states that the numerous officers in the vicinity of 2810 Easton came there in response to call number 378096 at 1:53 a. m., how is it possible that nine persons were arrested, a truck was summoned, a car was towed, and everyone was out of the area in time for "subject Clayton" to be found badly beaten at precisely the same spot precisely 42 minutes later? Secondly, given the number of officers who, according to Grimes, responded

to call 378096 for a shooting at 2810 Easton at 1:53 a. m., why is it that only the regularly assigned cruiser responded to the same call at the same address only 42 minutes later?

Finally, radio dispatch ticket 378149 (Pl. Ex. 31) shows that another call was received that a prowler was attempting entry into 2810 Easton at 3:24 a. m. The cruiser assigned reported back nine minutes later that the call was unfounded. Again, not a word about any damage to the premises.

All of this evidence confirms appellants' presentation: that as late as 3:30 a. m., the only damage in the area of 2810 Easton were the holes in the plate glass windows. It surely is clear that Police Inspector Robert W. Matteson's statement (Pl. Ex. 27) that the damage had been done when police responded to call 378122 at 2:35 a. m. is, to quote the trial judge, "ludicrous". (It might be noted that it also conflicts with appellee Grimes' deposition.)

John Nichols, a St. Louis Firefighter, testified that he was one of a group of firemen who answered a call to 2810 Easton in the early morning of September 5, 1968 (A. 54). The precise time of the call was 4:13 a. m. (Pl. Ex. 29). (Defendant Grimes made an arrest in the 2800 block of Easton at 3:50 a. m. (Pl. Ex. 27).) When Nichols arrived, the Black Liberators' car was on fire (A. 55-56; Pl. Ex. 1). Eight to ten people were standing about, some of them armed with rifles (A. 58, 65), one of whom Nichols had gone to school with and knew to be a police officer (A. 56-57). One of these persons took an ax from the fire truck and broke out the windows of 2810 Easton, and he and the other persons then went inside and demolished furniture (A. 59-60). A uniformed police officer stood by and watched without making any effort to halt the de-

struction (A. 60-62). One of the persons who had engaged in the destruction said to Nichols, "We're going to run these motherfuckers out of town," and another told him that the Black Liberators had shot into Lieutenant Grimes' home and into a police station, and done some damage to the office of Commissioner Gates (A. 62).

Lawrence Saunders, a St. Louis Firefighter who answered the same call, testified that there were "several" people whom he took to be "officers of the law" present when he arrived (A. 94). He testified that he heard glass breaking (A. 95) and that the people were inside 2810 Easton (A. 96). Saunders saw a truck with "Police" painted on the side back up to the curb in front of 2810 Easton (A. 96).

That the police ended up in possession of material seized from 2810 Easton there can be no doubt. See Plaintiffs' Exhibits 4, 27 and 28. The witness Washington, a Liberator, testified that property had to be destroyed in order to gain possession of some of the material which ended up in the hands of the police (A. 198).

That is the evidence with respect to the destruction of 2810 Easton, except to note that the officer dispatched to the scene of the fire reported back that the call was a false alarm (Pl. Ex. 31; ticket no. 378179). Appellees concede that this was in error (stipulation attached to Pl. Exs. 30 and 31).

2. *Prosecution Practices.* The record reflects a number of instances in which prosecutions were initiated or continued without good faith. It also reflects the manner in which the police department and the prosecutor in cooperation use the challenged ordinances to suppress dissent and unpopular causes.

The record is replete with examples of persons arrested upon the charge of "failure to obey the reasonable request of a police officer." See, for instance, Plaintiffs' exhibits 22 (Koch), 23 (Green, Mitchell and Brown)[9] and 25 (Barnes, Davis and Witte). There is no such offense, although the language closely parallels that found in the loitering ordinance. And yet the warrants continue to issue, and those arrested continue to be required to post additional bond on the charge (Pl. Ex. 25). One way this is made possible is shown on the face of Exhibit 23; the City Counselor simply translates "failing to obey a reasonable direction of" to "interference with". The police never confuse these two "offenses", even though the City Counselor does; when the police want to charge a person with interference, they charge him with interference. See, for example, Exhibit 20 (Hopper) and Appendix 219-20 (testimony of Rooks). The implication is plain: the translation is made by the City Counselor solely for the purpose of lodging a charge against a person who is guilty of nothing.

Another method is to combine the "failure to obey" charge with another one, such as peace disturbance (e.g., Pl. Ex. 25). This method has the advantage of allowing the non-offense to ride behind the smoke screen of the offense which is defined by ordinance. There is no evidence that the City Counselor has made any effort to put a stop to either of these practices, although he is privy to both.

The testimony of the witness Hopper (A. 376) shows that he was forced to trial on a charge of peace disturbance even though the alleged complaining witness had no incriminating evidence to offer.

3. *Bail Practices.* Appellants have demonstrated that bail is used as a method of summary punishment and as a tool for harassment by the Police Department. The most obvious and glaring example concerned Marvin Chambers. Upon his arrest on a charge of running a red light, his bail was set at $50.00 (A. 248). Since Mr. Chambers had only $30.00 cash with him at the time, the police called in a bondsman. When the bondsman arrived, the bail was increased from $50.00 to $250.00 (A. 248). This increase was for the obvious purpose of raising the cost to Mr. Chambers of the bondsman's services. This is but another example of police chilling First Amendment exercise by forcing appellants and members of their class to incur unwarranted expenses and, in effect, to buy their freedom. Appellants, and members of their class, are almost invariably poor people, yet bail requirements for traffic violations, misdemeanors and bogus charges continually sap their limited financial resources. Appellants produced uncontradicted evidence of frequent use of the burdensome cost of bail procedures. Appellant Green had bail set at $2,500.00 for traffic violations and a misdemeanor charge (A. 260). Appellant Koch had bail at $250.00 (Pl. Ex. 21). Rooks' bail was $500.00 (Ex. 20). Hopper had bail set at $250.00 (Ex. 20). Hutchins' bail was $1,000.00 (Ex. 24). Scales was forced to produce bail of $1,000.00 (Ex. 24). Appellant Koen had his bail set at $1,000.00 (Ex. 24). Chambers had his bail raised to $250.00 (A. 248). The Rev. Witte had bail set at $250.00 (Ex. 25). Davis had bail set at at $250.00 (Ex. 25). Barnes had bail set at $250.00 (Ex. 25). Green, Brown and Mitchell each had bail set at $150.00 (Ex. 23). All of these bail amounts were for ordinance violations or misdemeanors. The cost of securing bail has become part of the cost of group affiliation

or civil rights activism. By continually forcing appellants and members of their class to secure the services of bail bondsmen, appellees have placed a financial burden on those advocating causes unpopular with appellees. The total amount of the bails outlined above comes to $7,950.00. This amount is, of course, wholly unrelated to the likelihood of appellants appearing for trial. Bail is clearly being used to harass and intimidate members, potential members, friends, and those in sympathy with civil rights groups falling within the class.

4. *City Court Procedures.* If, then, the person arrested cannot make bail, he is forced to trial the following day in the City Court. One point needs to be made at the outset: you don't have to be guilty of anything to be convicted by Judge Cady. Instances demonstrating this have already been alluded to. Plaintiffs' Exhibit 19, the transcript of the trial of four of the persons arrested for unlawful assembly after the meeting at the Sheldon Memorial, was introduced to show how bad this can be. Frank Washington and Michael Heron were both convicted at that trial. And yet, one must read the transcript carefully in order to discover that they are even mentioned in the prosecution's testimony; and when they are mentioned, the testimony is simply that they were present and serving as ushers. Heron and Washington were represented by two skilled attorneys. If persons who are represented by counsel can be convicted without evidence of any kind, what chance has the innocent person who is without counsel?

The procedures in City Court No. 1 are described in the testimony of the witnesses Guthrie (A. 397-400, 410-412) and Hopper (A. 376). After they are arrested, defendants who cannot make bond are forced to appear in court the

next day. They are not advised of their right to obtain a continuance, or to try to make bond, or to obtain an attorney, or to properly defend themselves. The city puts on its case. The defendant is then asked if he wants to take the stand. The only protection he gets is advice from the prosecutor. The defendants are not advised of their rights to take appeals, nor of their right to get their own money from the custody of the Sheriff's office in order to pay the necessary fee for taking an appeal if they want to do so. The witness Hopper testified that he was not even allowed a jury trial in the said court. All this testimony is confirmed by the deposition of appellee Cady (A. 607 28), which indicates that there are no rules, and that at best he relies on the marshal and the prosecutor to advise the defendants of their rights. It is clear from his deposition that Judge Cady is a mere figurehead so far as setting bond, that he signs anything the marshal puts in front of him, and that the amount of the bond is not related in any reasonable way to the risk of the person's failing to appear. This is particularly true on appeal, where the bond is automatically set at double the amount of the fine, and even larger amounts where jail time is decreed. The standard simply has nothing to do with the reliability of the defendants as to appearing for trial.

5. *Judge Cady's Discriminatory Sentences.* The evidence with respect to this point is adequately summarized in the argument, *infra*, and is not duplicated here.

6. *Appellees' Aims and Purposes.* A few pieces of testimony highlight the aims and purposes of appellees, and the chilling effect their activities have upon protected freedoms. A police officer said, after destroying the Liberator

headquarters, "We're going to run these mother-fuckers out of town" (A. 62). Appellee Grimes told a group of people, "I'm going to kill you all, or you all are going to kill me one" (A. 71). A police officer said to appellant Allen, who had just witnessed the arrest of six friends, "You God damned kids are always causing trouble; why don't you stay home?" (A. 150). In two instances, the police department released information in an effort to destroy the reputations of persons whose views they disliked; this evidence is particularly strong in the case of Ocie Pastard, less strong with respect to appellant Koch (both *supra*).

Witness Helmreich was arrested and put in jail simply for being seen on the street with members of the Liberators. The testimony is clear that the police were primarily interested in knowing what his relationship to the Liberators was, and that they became hostile to him when he said that he might by sympathetic towards them (A. 314-17). Witness Hopper, whose only organizational ties are with the Boy Scouts, found himself arrested, tried twice, and forced to spend $620 simply because he had the bad luck of being present, since in this instance his views coincided with theirs, when members of appellants' class were under the usual heavy police attention. Finally, the testimony of Sergeant Black confirms that of other witnesses: arrests without cause followed by bad faith prosecutions impose burdens of bond, attorneys' fees, the risk of capricious findings of guilt and discriminatory sentences which become so onerous that it is often easier and cheaper to plead guilty and accept an undeserved conviction and minimum penalty.